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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. **72-196**

BENJAMIN A. JAVITS,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York.

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In the

Supreme Court of the United States

October Term, 1972.

No. .

Benjamin A. Javits,

Petitioner.

v.

The Association of the Bar of the City of New York,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York.

Petitioner, Benjamin A. Javits, petitions for a writ of certiorari to review the order of the Appellate Division, First Department, of the New York State Supreme Court which suspended Petitioner from practising law in New York State for three years. It will be demonstrated below that the New York Courts flagrantly violated the federally protected constitutional rights of Petitioner as embodied in the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and in so doing, have ignored controlling decisions of this Court. In addition, the arbitrary procedures of the New York Courts against Petitioner have placed in issue herein novel questions of Federal Constitutional law of great importance which merit review by this Court.

Opinions Below.

The Report of the Referee appointed by the Appellate Division of the Supreme Court of the State of New York, First Department, to hear and report on the proposed disciplinary action is printed herein as Appendix A.

The opinion of the Appellate Division, rendered on January 5, 1971, is reported at 35 A D 2d 442 (1st Dep't 1971). The majority opinion of the Court and the dissenting opinion of Justice McNally are printed herein as Appendix B to this petition. The order of the Appellate Division which implemented the above opinion of said Court, was entered on January 5, 1971, and is printed herein as Appendix C to this petition.

The order of the Appellate Division denying Petitioner's motion for leave to appeal the above order to the New York Court of Appeals, entered on March 18, 1971, is printed herein as Appendix D to this petition.

The order of the Court of Appeals of the State of New York dismissing the appeal of Petitioner was entered on May 13, 1971, and is printed herein as Appendix E to this petition.

The order of the Appellate Division entered on October 14, 1971, which denied Petitioner's motion for reargument of the denial by the Appellate Division of his motion for leave to appeal is printed herein as Appendix F to this petition.

The order of the Court of Appeals of the State of New York entered on January 5, 1972, which denied Petitioner's motion for leave to appeal to the Court of Appeals, is printed herein as Appendix G to this petition.

The order of the Court of Appeals of the State of New York entered on May 4, 1972, which denied Petitioner's motion for reargument of the denial of his motion for leave to appeal to the Court of Appeals is printed herein as Appendix H to this petition.

Jurisdiction.

The final order of the New York Court of Appeals, the highest Court of the State, which denied Petitioner's motion for leave to reargue the denial by the New York Court of Appeals of his motion for leave to appeal to that Court, was entered on May 4, 1972. This was the final remedy available to Petitioner in the New York State Courts. The prior orders of the New York State Courts which this petition seeks to review are set forth above.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Was it a violation of the constitutional rights of Petitioner as set forth in the due process clause of the Fourteenth Amendment to the United States Constitution, as defined by decisions of this Court, for the Courts of the State of New York to suspend him from practising law based upon charges to which Petitioner was given no notice or opportunity to be heard?

2. Were the constitutional rights of Petitioner as set forth in the due process clause of the Fourteenth Amendment to the United States Constitution violated by virtue of the interpretation of State procedural law by the New York Courts so as to bar Petitioner from obtaining in-

dependent judicial review of his contention that his constitutional rights were violated by the Appellate Division?

3. Were the constitutional rights of Petitioner as set forth in the equal protection clause of the Fourteenth Amendment to the United States Constitution violated by virtue of the interpretation of State procedural law by the New York Courts so as to provide a forum for judicial review of disciplinary action against public employees and other professionals licensed by the State while providing no such forum for attorneys who have been subjected to disciplinary action?

Constitutional Provisions Involved.

United States Constitution, Amendment XIV:

> "• • • nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved.

1. *McKinney's Consolidated Laws of New York*, Civil Practice Law and Rules, §5601:

> "Appeals to the Court of Appeals as of Right:
>
> • • •
>
> "(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:
>
> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

2. *McKinney's Consolidated Laws of New York*, Civil Practice Law and Rules, §5602:

"Appeals to the Court of Appeals by Permission:

"(a) *Permission of appellate division or court of appeals.* An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

"1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

"(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

"(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601:"

Statement.

Petitioner, Benjamin A. Javits, seeks review of the action of the New York State Courts, which have arbitrarily and systematically stripped him of his right to practice law in the State of New York for a period of three years.

thereby depriving him of his reputation earned after an unblemished and distinguished career before the Bar spanning more than 48 years. In so acting, the Courts have deprived Petitioner of those constitutional rights which this Court has stated (*Matter of Ruffalo*, 390 U. S. 544 [1968]) are protected by the due process clause of the Fourteenth Amendment. It will be shown below that the State Courts have totally ignored the decision of this Court in *Matter of Ruffalo*, and in doing so, have deprived Petitioner of the most basic elements of due process, to wit; the right to notice of charges and the right to be heard.

In addition, the Courts below, in interpreting their jurisdiction under State procedural law, have failed to provide Petitioner, as an attorney, with any forum for independent judicial consideration of his contention that his constitutional rights have been violated. In this respect, we ask this Court to decide a novel and important constitutional issue, one never before decided by this Court: is an attorney deprived of his constitutional rights entitled to have at least one judicial determination of the merits of his claim that his constitutional rights have been violated?

Furthermore, we ask this Court to decide, as a corollary to the above question, an equally novel and important constitutional issue: does the equal protection clause of the Fourteenth Amendment require that Petitioner, as an attorney, be entitled, as of right, to at least one independent forum to review his entire case since all public employees and other licensed professionals in New York, except attorneys, are entitled by State law to such review as of right. In other words, we ask this Court to decide whether it is a violation of equal protection for the State to single out attorneys and deprive them of important procedural rights, which all other members of their class enjoy.

Facts.

This disciplinary proceeding was commenced on or about October 30, 1969, by the service upon Mr. Javits of a petition, copy of which is annexed hereto as Exhibit 1. The petition constitutes the charge sheet and is the equivalent of an indictment or information in a criminal case. The critical fact herein is that the petition contains one single charge against Mr. Javits. The charge (Paragraph IV) reads as follows:

> "Benjamin A. Javits, the respondent, has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree."

The petition then lists various facts which allegedly support this charge. The one single charge against Petitioner arose out of his representation of Lewis Rosensteil, a multi-millionaire, who came to Mr. Javits in the latter part of 1961 and requested that Mr. Javits represent him in his efforts to obtain a dissolution of his marriage to Susan Rosensteil.

Mr. Javits told Mr. Rosensteil that he was not a matrimonial lawyer and that accordingly it might be advisable for Mr. Rosensteil to seek another attorney. However, Mr. Rosensteil pressed Mr. Javits, who finally agreed to take the case and use his best efforts to achieve a settlement.

However, having been unable to reach a settlement, Mr. Javits advised Mr. Rosensteil that the matrimonial litigation would be handled by Sol Rosenblatt, who, at

that time, was one of the foremost matrimonial lawyers in New York City. Mr. Javits told Mr. Rosensteil that Sol Rosenblatt would be totally in charge of the litigation in the case and Mr. Rosensteil agreed to the arrangement.

The charge of the Bar Association, stripped to its essentials, is that a gratuity was paid to a Mexican public official in the amount of $10,000 in order to obtain the nullification of Susan Rosensteil's divorce to her former husband, Mr. Felix Kaufman, so that the Kaufman-Rosensteil marriage would still exist thus invalidating the marriage of Susan Rosensteil to Lewis Rosensteil.

Petitioner contends that the Record does not support the charge that any gratuities were offered or paid. However, in any event, Mr. Javits strongly urges that there is not even the remotest shred of evidence to support the fact that he had any knowledge of the offer of any gratuity assuming such offer occurred. In fact, the uncontradicted evidence is that Mr. Javits was not even in New York when the alleged gratuity was supposedly paid. Indeed, the Record indicates that in February of 1962, when the alleged payment was made, Mr. Javits was in his late 60's, semi-retired and was spending a substantial amount of his time in Florida, having delegated control of the matrimonial action to Sol Rosenblatt*, with the consent of Mr. Rosensteil.

Nevertheless, as we have seen, Petitioner was given no opportunity to address his contention that there was no evidence to support the above charge to any Court other than the Appellate Division. If given the opportunity, Petitioner will demonstrate, beyond any doubt,

*Mr. Rosenblatt was deceased at the time that the suspension upon Mr. Javits was imposed by the Appellate Division.

that there is no evidence in the Record to support the fact that he had any knowledge or any connection with any moneys paid unlawfully to any Mexican public officials or nationals.

After service of the charge, a Referee was then appointed by the Appellate Division to hear testimony and to render a report. The actual findings of fact and resultant disciplinary action was solely within the jurisdiction of the Appellate Division. In this connection, the Referee's report to the Appellate Division (Appendix A) stated the facts and found the one "*charge* has been sustained." (Emphasis added.) Yet the Appellate Division, in its opinion, stated that the "*charges*" had been sustained and made findings and imposed punishment on the basis of the following alleged professional misconduct (35 A D 2d at page 445):

1. The improper solicitation of employment in violation of Canon 27 of the Canons of Professional Ethics;

2. Fostering unjustified and questionable litigation and defenses in violation of Canons 30 and 31; and

3. A lack of candor and fairness with the Courts in violation of Canon 22. (Emphasis added.)

In reaching beyond the charge, and convicting Petitioner of charges to which he was given no notice or opportunity to be heard, the Appellate Division is clearly the tribunal which violated the rights of the Petitioner.

After the decision of the Appellate Division, Petitioner sought review on the following grounds:

1. Conviction of three charges of which he was given no notice or opportunity to be heard in accordance with elementary due process as defined by this Court in *Matter of Ruffalo, supra,* and

2. Review of the conviction of one charge on the ground that there was not sufficient evidence to support the charge.

Petitioner thereafter utilized the first procedure available to him under State law and requested the same Court which deprived him of his constitutional rights (the Appellate Division) for permission to appeal to the highest State Court, the New York Court of Appeals. The Appellate Division held (see Appendix D), that Petitioner did not have to seek leave to appeal because he was entitled to an appeal as a matter of right.

However, the State's highest Court, the Court of Appeals, disagreed. In its brief order (see Appendix E), the Court of Appeals simply held that "no substantial constitutional question is directly involved." The Court then advised Petitioner to move for reargument in the Appellate Division "if he believes, as he asserts, that some of the charges sustained were found without adequate notice to him." In other words, the Court of Appeals held that the denial of notice and opportunity to be heard was not a substantial constitutional question directly involved and that Petitioner was therefore not entitled to review as of right under New York procedural law. Petitioner cited the decision of this Court in *Matter of Ruffalo, supra,* to the New York Court of Appeals, but the Court obviously either ignored that decision or tacitly rejected its holding.

Thereafter, Petitioner sought reargument in the Appellate Division of his motion for leave to appeal to the Court of Appeals. However, the Appellate Division (see Appendix F) denied his request without opinion. Thereafter, the Court of Appeals also denied Petitioner's request for leave to appeal (see Appendix G) and his further request for reargument of said denial (see Appendix H).

It is the position of Petitioner that the Courts below, in convicting him and suspending him from practicing law based upon charges of which he was given no notice or opportunity to be heard, ignored the holding of this Court in *Matter of Ruffalo, supra.* In this respect alone, certiorari should be granted.

In addition, Petitioner also asserts novel and important constitutional issues of first impression which merit review by this Court.

Petitioner alleges that he was deprived of constitutional rights of the most elementary nature by the Appellate Division. Yet Petitioner has been denied a forum to present this argument. The Court of Appeals has stated that Petitioner's arguments do not directly involve substantial constitutional questions such as would mandate its review under State procedural law, and further, both the Appellate Division and Court of Appeals have refused to exercise their discretion to permit an appeal. Thus, his constitutional arguments have never been heard.

As a corollary issue, Petitioner, as an attorney, stands as a member of the only professional class in New York whose members can be deprived of their livelihood and reputation by the State, yet be afforded no tribunal to

air their claims. In this respect, Petitioner, as an attorney, has been denied equal protection of the laws as well as due process.

It is respectfully submitted that this Court has never ruled on these basic constitutional questions. Indeed, it is submitted that this Court should exercise its certiorari jurisdiction and decide these questions in favor of Petitioner, for, if it does not do so, the constitutional rights of attorneys as set forth by this Court in *Matter of Ruffalo, supra,* will be meaningless.

REASONS FOR GRANTING THE WRIT.

A.

The New York Courts disregarded the decision of this Court in *Matter of Ruffalo*, which held that it is a violation of due process to suspend an attorney from practising law based upon charges to which the attorney was given no notice or opportunity to be heard.

This Court held in *Matter of Ruffalo*, 390 U. S. 544 (1968), that in a federal bar disciplinary proceeding, which is "quasi-criminal" in nature, due process requires that an attorney be given full notice and an opportunity to be heard and that any finding against an attorney based upon charges not previously presented to the attorney violates due process. It is clear that the constitutional safeguards expounded in *Ruffalo* apply equally to State Bar disciplinary proceedings through the Fourteenth Amendment. Nevertheless, the New York State Courts ignored *Ruffalo* and stripped Petitioner of his forty-eight-year unblemished career without notice or opportunity to be heard. It is thus imperative that this

Court finally and clearly reiterate the principle that in State Bar disciplinary proceedings, attorneys are entitled to all elements of procedural due process and that State Courts cannot disregard *Ruffalo.*

It can no longer be argued that State action in stripping an attorney of his right to practice law is civil and not criminal and can, therefore, be accomplished at the expense of procedural due process. As the Second Circuit Court of Appeals recently stated in *Erdmann v. Stevens*, 458 F. 2d 1205, 1209 (2d Cir. 1972):

> "* * * in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding. A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See *Bradley v. Fisher*, 80 U. S. [13 Wall.] 335, 355, 20 L. Ed. 646 (1872); *Spevack v. Klein*, 385 U. S. 511, 516, 87 S. Ct. 625 17 L. Ed. 2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being 'of a quasi-criminal nature,' *In Re Ruffalo*, 390 U. S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968)."

In this connection this Court has continually pointed out that State action in depriving an attorney of his professional standing is as powerful a form of punishment as conviction of a crime. See *Speiser v. Klein*, 385 U. S. 511 (1967); *Matter of Ruffalo, supra;* see also *Law Students Research Council, Inc. v. Wadmond*, 401 U. S. 154 (1971).

The Star Chamber tactics visited upon Petitioner herein are glaring and fly in the face of the *Ruffalo* holding and all elements of due process and fair play.

Specifically, Petitioner was charged with *attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree.*" See Exhibit 1, Paragraph IV. In other words, Petitioner was charged with fraudulently paying moneys in order to obtain and defend a judicial decree. *He was charged with this one single charge and with nothing else.* Nevertheless, the Appellate Division, reaching far beyond the above charge found (*In Re Javits*, 35 A D 2d 442, 445 [1st Dep't 1971]) that "the evidence, within the framework of the *charges* does establish serious professional misconduct" as follows:

(a) The finding of the improper solicitation of employment.

The Appellate Division referred to Canon 27 of the Canons of Professional Ethics which provides in part as follows:

> "It is unprofessional to solicit professional employment by circulars, advertisements, personal

communications or interviews not warranted by personal relations."

In this connection, the Appellate Division found (35 A D 2d at page 444) that Petitioner had "solicited from Mr. [Felix] Kaufman a power of attorney" authorizing Petitioner's Mexican attorneys to appear for Mr. Kaufman. Mr. Felix Kaufman was one of the parties to the divorce decree which Petitioner was seeking to nullify.

Suffice it to point out that if Petitioner had known that he was being charged with unethical solicitation he would have presented evidence to demonstrate that the charge was totally without foundation. He would have offered evidence to show that the Mexican attorneys were retained on behalf of Felix Kaufman through Felix Kaufman's lawyer, one Abraham Kaufman, and that Felix Kaufman was also seeking to set aside his Mexican divorce decree.

It is respectfully submitted that if Petitioner had been notified of the solicitation charge in accordance with elementary due process, he could have offered the above evidence which would have completely exonerated him of that charge.

(b) The finding of the fostering of unjustified and questionable litigation and defenses.

The Appellate Division here without notice found Petitioner in violation of Canons 30 and 31 of the Canons of Professional Ethics, both referred to in the Court's Opinion (35 A D 2d at page 445), but there was no reference whatsoever to these Canons in the Petition under which Petitioner was charged.

Canon 30 provides in part that:

> "A lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work suppression or wrong."

And Canon 31 states in part that:

> "• • • The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility."

In this regard, the Court found (35 A D 2d at page 444) that the "Respondent proceeded in disregard of proper ethical standards to continue to urge the efficacy of the [nullification] decree" while "fully aware that it had been obtained without notice to [Mrs. Rosensteil] and that it was of questionable validity." In other words, despite the fact that Petitioner was not so charged, the Court convicted him of being unethical because he continued to advocate a decree obtained without "notice." The Court may have believed that once Petitioner learned that the nullification decree was obtained by utilizing other than personal service he should have stopped advocating the decree.

If Petitioner had been given notice of the alleged violations of these canons he could have rebutted the allegation by, among other things, offering expert testimony concerning the notice requirements of Mexican law. In this connection, the Record reflects that the Mexican federal court upheld the nullification decree in a litigated adversary proceeding thereby holding that the notice was proper. It was only after Petitioner had been

replaced as counsel to Mr. Rosensteil, and Mr. Rosensteil's new attorneys defaulted that the Mexican appellate court rendered a default judgment voiding the nullification decree.

(c) The finding of a lack of candor and fairness with the courts.

The Court here found Petitioner in violation of Canon 22 (35 A D 2d at page 445) but did not specify the manner in which he violated this Canon. Canon 22 is a very lengthy section and provides that:

> "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> "It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language of the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.
>
> "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.
>
> "A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

> "These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice."

Petitioner was not apprised of the specific part of this Canon which he was alleged to have violated. In fact, he was never even apprised that he was charged with violating any part of Canon 22. This procedure alone is antithetical to the concept of due process and fair play.

By depriving Mr. Javits of notice and an opportunity to be heard, the Appellate Division directly violated the decision of this Court in *Matter of Ruffalo, supra*, wherein the Court states (390 U. S. at page 550):

> "In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F. 2d, at 462.
>
> "These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 U. S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no oportunity to expunge the earlier statements and start afresh."

In *Ruffalo*, the attorney had the benefit of being advised during the hearing of the new charge and was at least given a continuance to prepare a defense. Needless to say, the injustice in the case at bar is far greater than in *Ruffalo*, because here, Petitioner was, in effect, advised of

the new charges, not during trial, but only after he had been sentenced.

Suffice it to point out that the above findings of violations of the Canons of ethics include extremely serious misconduct. There was no possible way for Petitioner to prepare a defense to these charges if he was not notified that he was being charged with this misconduct. Thus never having been informed that he was being charged with violating these Canons, Petitioner could not defend against them and was, therefore, stripped of the "first fundamental of due process" which is "notice of the charges made." *Murray v. Murphy*, 24 N. Y. 2d 150, 157 (1969).

B.

The Court should decide the novel and important constitutional question of first impression which is whether an attorney stripped of his professional standing by State action is entitled by due process to have an independent Court consider the question of whether the Court of first instance violated his constitutional rights.

Petitioner herein was tried, convicted and sentenced by the Appellate Division, First Department, which by law is the Court of first instance in matters involving discipline of attorneys. See *Erdmann v. Stevens, supra*, discussing the role of the Appellate Division in State bar disciplinary proceedings. The Appellate Division is empowered, as it did here, to assign a referee to hear evidence and render a report with recommendations. However, the Appellate Division is the only Court which may

impose discipline and make findings, the Referee's function being only to hear and report.

Petitioner contends (see above) that the Appellate Division deprived him of adequate notice and opportunity to be heard, a constitutional right which is federally protected (see *Matter of Ruffalo, supra*). However, as will be shown below, Petitioner was afforded no judicial forum to determine the merits of his constitutional arguments.

The problem is totally unique because the Appellate Division, the State's intermediate appellate tribunal, is the body which makes findings and imposes punishment in attorney disciplinary proceedings. If the Appellate Division violates an attorney's rights of due process, then these rights are meaningless if the attorney is deprived of an independent body to decide whether these rights have been violated.

New York law (*McKinney's Consolidated Laws of New York*, Civil Practice Law and Rules, §5601) provides as follows:

> "(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:
>
> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States:"

The New York Courts have held that the meaning of the phrase "constitutional question directly involved" is that the Appellate Division must pass upon the constitutional question. *Matter of Haydorn v. Carroll*, 225 N. Y. 88 (1918). It is apparently for this reason that the Court

of Appeals dismissed Petitioner's appeal herein on the ground that "no substantial constitutional question is directly involved." (See Appendix E.)

The injustice of the above rule as applied to Petitioner and other attorneys is manifest. The Bar Association argued below and rightly so, that the Appellate Division did not decide the constitutional question of notice. However, the Appellate Division will obviously never decide the constitutional question when it is the very Court which, by its decision, deprives the attorney of his constitutional rights. In other words until the Appellate Division rendered its decision finding Petitioner guilty based upon charges of which he had no notice, the constitutional issue did not arise. Obviously the Appellate Division could not have ruled on the constitutional question. Consequently, if this decision is permitted to stand, a New York attorney disciplined by the Appellate Division, will not be entitled to an appeal as of right on constitutional grounds to the Court of Appeals because the Appellate Division, the Court of first instance, which allegedly infringed his rights, will not be in a position to decide the constitutional question.

New York law also provides for discretionary permission to appeal to the Court of Appeals. See *McKinney's, supra*, Section 5602. However, both the Appellate Division and the Court of Appeals denied Petitioner leave to appeal. In his arguments to both Courts, Petitioner contended that he had been deprived of his constitutional rights and that he was not afforded an independent forum to air his constitutional arguments. However, leave to appeal was denied.

The New York Court of Appeals has made it clear that a denial of leave to appeal has no value as precedent and is not equivalent to an affirmance of the order below. *Matter of Marshant v. Meade-Morrison Manufacturing Co.*, 252 N. Y. 284 (1929). The granting of leave is purely discretionary. Consequently, it cannot be argued that requesting permission to appeal to the Court of Appeals constitutes an appeal.

This aspect of New York procedural law was recently referred to by the Second Circuit in *Erdmann v. Stevens, supra*, a case wherein the Court was asked on constitutional grounds to stay disciplinary action by the Appellate Division against an attorney. There, in declining to intervene in the disciplinary action, the Federal Court assumed that the New York Court of Appeals would be required to consider the appeal. The Court stated therein as follows (458 F. 2d at p. 1212):

> "In reviewing disciplinary proceedings on questions of law, the New York Court of Appeals is not, and constitutionally could not be, as limited as it is with respect to questions of fact. It may not uphold a finding of misconduct on the part of an attorney unless it concludes that 'no substantial legal right of the accused has been violated.' *Matter of Goodman*, 199 N. Y. 143, 144, 92 N. E. 211 (1910). *Erdmann's important constitutional claims would therefore be assured of review, if necessary, by the New York Court of Appeals.*" (Italics added.)

However, the State Court of Appeals herein did not conclude that "no substantial legal right of the accused had been violated" because it did not even consider the appeal.

It is respectfully submitted that this Court should, in the interests of seeking enforcement of its decision in *Matter of Ruffalo*, grant certiorari herein. The Court has stated in *Ruffalo* that attorneys are entitled to certain constitutional rights. *Matter of Ruffalo* is meaningless if there is no procedure in New York State whereby an attorney can seek enforcement of these rights.

C.

This Court should decide the important question of first impression which is whether it is a denial of equal protection of the laws for a State to provide a judicial procedure for review of disciplinary action against public employees and other professionals licensed by the State while providing no such judicial forum for attorneys.

It has already been established above that New York State provides no process whereby an attorney, deprived of his professional standing by the Appellate Division, can have independent review of this determination. In this case, where constitutional deprivation is alleged, there is indeed no forum where these allegations can be aired.

All other professionals licensed by the State, as well as all public employees, have a judicial remedy where State action deprives them of their professional standing or their status as a public employee. See *McKinney's, supra*, §7801 *et seq*. This remedy, known as an Article 78 Proceeding, is a procedure whereby the party seeking review of disciplinary action, can institute a special proceeding in the State Court, which acts as the reviewing body for actions and findings of the departmental body, reviewing constitutional issues as well as the question of whether

there was substantial evidence to support the finding of guilt. The following cases illustrate the protection afforded: *Murray v. Murphy, supra* (police officer); *Popper v. Board of Regents*, 26 A D 2d 871 (2d Dep't 1966) (dentist); *Shapiro v. Board of Regents*, 16 N. Y. 2d 783 (1965) (physician); *White v. Board of Education*, 52 Misc. 2d 911 (N. Y. Co. 1966) (teacher); *Ancis v. Lomenzo*, 31 A D 2d 615 (1st Dep't 1968) (real estate broker); and *Coady v. Case*, 30 A D 2d 546 (2d Dep't 1968) (civil servant).

It is respectfully submitted that as far as equal protection is concerned an attorney is a member of the same class as public employees and other professionals, such as doctors and engineers, who are licensed by the State. All members of this class enjoy their livelihood and reputation professionally by virtue of State licensing or employment. All members of the class stated above, with the sole exception of attorneys, are provided with a procedure for independent review of disciplinary action against them as well as an independent forum to assure protection of their constitutional safeguards. Clearly, the failure to provide attorneys with a similar procedure constitutes a flagrant violation of equal protection of the laws.

In the recent case of *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S. D. N. Y. 1969), *affirmed on other grounds*, 401 U. S. 154 (1971), Chief Judge Friendly, writing for a three-judge Federal Court, pointed out that attorneys as a group cannot be singled out and discriminated against as a class. In this case, various New York law students, who had passed the New York State Bar Examination, challenged the constitutionality on First Amendment grounds of various rules promulgated by the Bar Character and Fit-

ness Committee under the direction of the Appellate Division of the New York State Supreme Court. They sought injunctive relief against the Appellate Division and its justices, alleging that the civil rights of the law students were violated pursuant to the Federal Civil Rights Act.

The State contended that the Judges of the Appellate Division were immune from suit. The Court, while conceding that a Judge could not be sued for damages while acting in his official capacity, ruled otherwise with respect to injunctive relief. The Court held that (299 F. Supp. at page 123):

> "To hold otherwise would be to leave without a remedy a significant class of the deprivations of Federal rights under color of State law that Congress intended the Federal Courts to redress under 42 U. S. C. §1983 and 28 U. S. C. §1343."

The point is that lawyers, as a group, cannot be singled out and discriminated against when constitutional rights are involved.

We have already seen that Petitioner has been afforded no independent judicial tribunal to hear and determine his constitutional arguments. This, in and of itself, is a denial of due process. However, the fact that other professionals and governmental employees similarly situated would have an independent forum for redress of grievance, clearly establishes that the failure to provide Petitioner, as an attorney, with such a forum constitutes a denial to Petitioner of equal protection of the law.

Conclusion.

For the foregoing reasons, it is respectfully requested that this writ of certiorari be granted.

Respectfully submitted.

ERIC M. JAVITS.
Attorney for Petitioner.
1345 Avenue of the Americas,
New York, N. Y. 10019
212 JU6-4050.

GEORGE R. HINCKLEY.
HAROLD J. SMITH.
Of Counsel.

Exhibit I.

SUPREME COURT OF THE STATE OF NEW YORK.

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

of

BENJAMIN A. JAVITS,

An Attorney.

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK—FIRST DEPARTMENT.

The petition of The Association of the Bar of the City of New York respectfully alleges, upon information and belief:

I. The petitioner herein is a corporation duly created by an act of the Legislature of the State of New York, passed April 28, 1871. One of its purposes, as recited by its amended charter and constitution, is that of elevating the standard of integrity and courtesy in the legal profession.

II. Benjamin A. Javits, referred to as the respondent herein, was admitted to practice as an attorney and counselor-at-law in the State of New York on December 11, 1922, at a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in the County of Kings.

III. (a) On March 4, 1968, following an investigation of a complaint received, a letter was served upon respondent by petitioner's Committee on Grievances containing charges of alleged professional misconduct on his

part, substantially the same as set forth in paragraph IV of this petition. Respondent was notified that petitioner's Committee on Grievances would meet to investigate the charges and was requested to attend. Hearings were charges and was requested to attend. Hearings were held on October 9, 16, 23, 1968, and June 18, 1969. Respondent was personally present at the hearings held on October 9, 1968 and June 18, 1969. He did not personally appear at the hearings held on October 16 and 23, 1968, but was represented by counsel through whom he consented to the taking of testimony in his absence. At the hearing held on June 18, 1969, respondent testified in his own behalf. Evidence in support of and in answer to the charges was received by the Committee and, after completion of the hearings, the Committee reported to the Executive Committee of the Association that, in its opinion, the case was such as to require prosecution in the courts.

(b) On October 8, 1969, the Executive Committee of The Association of the Bar of the City of New York adopted the recommendation of the Committee on Grievances that the matter be prosecuted in the courts and recommended that the Justices of this Court appoint counsel for the Committee on Grievances to prosecute the charges pursuant to the provisions of Subdivision 7 of Section 90 of the Judiciary Law of the State of New York.

(c) On October 16, 1969, the Justices of the Appellate Division, First Department, duly appointed counsel for the Committee on Grievances to prosecute this proceeding and this petition is presented pursuant to said order of appointment.

IV. Benjamin A. Javits, the respondent, has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying monies to Mexican public officials and another Mexican national in order

to improperly obtain and subsequently defend a nullification of a Mexican divorce decree, as follows:

1. In or about September 1961, the firm of Javits & Javits, Esq., was retained by Lewis S. Rosenstiel to represent him with respect to his marital difficulties with his wife, Susan Liss Rosenstiel, and, specifically, to obtain a divorce or annulment of the marriage, if possible.

2. Respondent was the partner in the firm of Javits & Javits, Esqs., in charge of the above retainer.

3. Subsequent to respondent's retainer, he employed Mrs. Mae Korn and other attorneys to assist Javits & Javits, Esqs., of counsel.

4. In or about November 1961, respondent sent Mrs. Korn to Mexico to investigate the validity of Mrs. Rosenstiel's divorce from her former husband, Felix Kaufmann, which had been obtained on or about October 2, 1954, in the First Civil Court of the District of Bravos, State of Chihuahua (hereinafter referred to as the Kaufmann decree).

5. Mrs. Korn thereafter reported to respondent that her investigation disclosed facts concerning the circumstances surrounding the Kaufmann decree which indicated that it had been improperly obtained and that grounds existed to institute an action to have it declared invalid which, if successful, could be used to sustain a suit for annulment by Mr. Rosenstiel in the United States upon the ground that he and Mrs. Rosensteil were never legally married.

6. After obtaining authorization to do so, Mrs. Korn retained the Mexican law firm of Basham, Ringe & Correa, Esqs., to institute an action in Mexico to nullify the Kaufmann decree.

7. In late January and early February, 1962, Mrs. Korn made inquiries of the Correa firm concerning the possibility of 1) bringing the action to vacate the Kaufmann decree ex parte and/or 2) calling the alleged irregularities in the obtaining of the Kaufmann decree to the attention of a Mexican public official in order to have him institute nullification proceedings on his own motion upon the ground that a fraud had been perpetrated upon the Mexican Courts, and was advised that no government official would institute such an action (although one might later be persuaded to intervene in an action brought by Mr. Rosenstiel), and that an action to nullify the Kaufmann decree should properly be brought by Mr. Rosenstiel upon actual notice to the parties, including Mrs. Rosenstiel, and that such an action, if contested, might take two or more years.

8. When respondent's client, Lewis S. Rosenstiel, expressed strong dissatisfaction with the estimated length of time necessary to so obtain a nullification decree, Miss Carmen Lopez Figueroa, a Mexican laywoman associated with Amalia Castillo Ledon, a member of the Mexican Cabinet, was hired to use her social and political connections in Mexico to expedite the obtaining of a nullification decree.

9. On or about February 26, 1962, a check in the amount of $10,000, charged by respondent to Mr. Rosenstiel as an expense related to the Mexican litigation, was drawn on a Javits & Javits, Esqs., account in payment of a bank draft in that amount from the Chemical Bank New York Trust Company payable to Jose Luis Sequerios then Lieutenant Governor and Attorney General of the State of Chihuahua, who had been contacted by Miss Figueroa.

10. On or about February 28, 1962, Mrs. Korn and Miss Figueroa went to Mexico to meet with Mr. Sequerios.

11. At their meeting on February 28, 1962, Miss Figu-

eroa tendered to Mr. Sequerios the previously purchased bank draft in the amount of $10,000, the existence of which had not been disclosed to Mrs. Korn.

12. Several days after the payment to him, Mr. Sequerios procured and turned over to Mrs. Korn and Miss Figueroa a fraudulent decree (hereinafter referred to as the Goldsmith decree), dated February 6, 1962, of the First Civil Court of the District of Bravos, State of Chihuahua, purporting to nullify the Kaufmann decree upon the petition of an alleged "Samuel Goldsmith", dated January 31, 1962, a third party who contended that he had been injured by the entry of the Kaufmann decree in 1954.

13. The Goldsmith decree had been obtained without notice to Mrs. Rosenstiel other than the alleged posting of the Goldsmith petition on the courthouse bulletin board in Juarez, Mexico, for a period of three days.

14. On or about March 8, 1962, Mrs. Korn and Miss Figueroa returned to New York and, upon delivering the Goldsmith decree, Miss Figueroa was paid the sum of $10,000, which sum was charged by respondent to Mr. Rosenstiel as an expense related to the Mexican litigation.

15. In or about June 1962, Mrs. Rosenstiel, having learned of the existence of the Goldsmith decree, instituted suit in Mexico to have it vacated upon the ground that it had been fraudulently obtained, without notice to her, in violation of her constitutional rights.

16. "Samuel Goldsmith", the petitioner who had allegedly instituted the proceeding resulting in the decree of February 6, 1962, nullifying the Kaufmann decree, never appeared in the action brought by Mrs. Rosenstiel to vacate the nullification decree obtained upon his alleged petition and the defense of the action was conducted solely

by attorneys retained by or on behalf of Javits & Javits, Esqs., who appeared, without authority, for "Goldsmith" and for Felix Kaufmann, whose cooperation respondent had obtained.

17. Throughout the litigation instituted by Mrs. Rosenstiel to vacate the Goldsmith decree, Miss Figueroa continued to be employed by respondent to exercise her political and social influence on behalf of respondent's client.

18. On or about June 15, 1962, respondent, on behalf of his client, paid Miss Figueroa the sum of $3,000 to be used as a contribution to a charity in which Miss Ledon, the member of the Mexican Cabinet, was interested in order to obtain "a favorable public relations climate" on behalf of respondent's client.

19. Respondent, thereafter, paid Miss Ledon's expenses incurred on a trip to the United States which he charged to his client's account for "public relations" related to the Mexican litigation.

20. On or about May 10, 1963, the Mexican Courts set aside the Goldsmith decree upon the ground that it had been obtained in violation of Mrs. Rosenstiel's constitutional rights.

V. Petitioner annexes hereto and hereby makes a part of this petition the affidavit of John G. Bonomi, verified the 28th day of October, 1969.

WHEREFORE, your petitioner respectfully submits this matter to the court and asks that such action be taken as justice may require.

Dated: New York, October 30, 1969.

Respectfully submitted,

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

By Louis A. Craco
Louis A. Craco
Secretary

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APPENDIX A.

Referee's Report.

SUPREME COURT OF THE STATE OF NEW YORK.

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

of

BENJAMIN A. JAVITS,

An Attorney.

I, GEORGE TROSK, the referee appointed herein by this Court, by the Order made and entered March 5, 1970, to take testimony in regard to the charges of unprofessional conduct by the above named respondent, as set forth in the petition, verified October 30, 1969, of The Association of the Bar of the City of New York, and to report the same, with my opinion thereon, to this Court, do hereby report as follows:

Petitioner was represented herein by its attorney, John G. Bonomi, Esq., first by Michael Franck, Esq., of counsel, and later by Martin J. Linsky, Esq., of counsel; respondent was represented herein by his attorneys, James H. Halpin, Esq., and Stanley S. Arkin, Esq.

Before entering upon the performance of my duties as referee herein, i. e., on March 17, 1970, I was duly sworn before Hon. Joseph Markowitz, one of the Justices of the Supreme Court of the State of New York.

Hearings were held herein on March 23, April 1 and April 17, 1970.

The Petition

The petition alleges:

> In or about September 1961 the firm of Javits and Javits were retained by Lewis S. Rosenstiel to represent him with respect to his marital difficulties with his wife, Susan, and, specifically, to obtain a divorce or annulment of the marriage, if possible; that respondent was the partner in the firm of Javits and Javits in charge of the above retainer and after the retainer he employed Mrs. Mae Korn and other attorneys as counsel to assist the firm; that in or about November 1961 respondent sent Mrs. Korn to Mexico to investigate the validity of Mrs. Rosenstiel's divorce from her former husband, Felix Kaufmann, in the court of the State of Chihuahua, Mexico, (the "Kaufmann decree"); that following Mrs. Korn's report to respondent, she, after being "authorized", retained a Mexican law firm to sue in Mexico to nullify the Kaufmann decree, but, Mr. Rosenstiel being dissatisfied with the advice of that firm that the action would have to be brought by him and might take two or three years, a Mexican "lawwoman", Miss Carmen Lopez Figueroa, "associated" with one Ledon, a member of the Mexican cabinet, was hired "to use her local and political connections in Mexico to expedite the obtaining of a nullification decree".

Without going into the details in which the subsequent proceedings in Mexico are alleged in the petition here, it is

sufficient for present purposes to state that following the allegations described above, the petition alleges that:

> "Several days" after the payment to Jose Luis Siquerios, then Lieutenant Governor and Attorney General of the State of Chihuahua—who had been "contacted" by Figueroa—of a $10,000 draft issued to his order by Chemical Bank New York Trust Company upon receipt of a Javits and Javits check in that amount, and charged by respondent to Mr. Rosenstiel "as an expense related to the Mexican litigation", Mr. Siqueiros procured and turned over to Mrs. Korn and Miss Figueroa "a fraudulent decree" dated February 6, 1962, of the Court of Chihuahua, purporting to nullify the Kaufmann decree, said "fraudulent decree" having been issued upon the petition of an alleged "Samuel Goldsmith" without notice to Mrs Rosenstiel other thar an alleged three day "posting" on the Courthouse bulletin board in Juarez, Mexico: that when Mrs. Korn and Miss Figueroa returned to New York on or about March 8, 1962, and delivered the Goldsmith decree, Miss Figueroa was paid $10,000, "which sum was charged by respondent to Mr. Rosenstiel as an expense related to the Mexican litigation".

It is then alleged that:

> In or about June 1962, Mrs. Rosenstiel, having learned of the Goldsmith decree, sued in Mexico to have it vacated on the ground it had been "fraudulently obtained, without notice to her, in violation of her constitutional rights": that "Samuel Goldsmith" "never appeared" in that action, and the defense of it was conducted "solely by attorneys retained by or on behalf of Javits

and Javits, Esqs.," and who appeared "without authority" for "Goldsmith and for Felix Kaufmann, whose cooperation respondent had obtained," and on or about May 10, 1963 the Mexican courts "set aside" the Goldsmith decree on the ground that it had been obtained in violation of Mrs. Rosenstiel's constitutional rights".

The petition also alleges that:

> Throughout Mrs. Rosenstiel's litigation to vacate the Goldsmith decree, Miss Figueroa continued to be employed by respondent "to exercise her political and social influence on behalf of respondent's client, and on or about June 15, 1962 respondent paid her $3,000 to be used as a contribution to a charity in which Miss Ledon, a member of the Mexican cabinet, was interested, "in order to obtain 'a favorable public relations climate' on behalf of respondent's client".

The Answer

Respondent's answer denies any attempt to perpetrate a fraud on the courts of Mexico or of the United States, or any violation of our law or canons; it admits many of the more or less innocuous allegations of the petition; it alleges that Sol Rosenblatt, whom respondent retained, was "experienced in Mexican affairs" and was "in charge of the Mexican aspects of the case" and, in effect, that he directed and approved all that was done; the answer also alleges that Miss Figueroa was hired "for the purpose of gathering information to and in exploring ways in which to proceed other than by direct action by Rosenstiel himself"; that the payment to Siqueiros was a "retainer for legal services" and that the decree

received from him "appeared to be entirely proper"; that respondent had no reason to believe that Siqueiros or anyone associated with him was engaging "in any wrongful practice", and that if any there was, "respondent knew nothing about it"; denies that any money was paid for the Goldsmith decree or that respondent knowingly "participated" in retaining lawyers to appear without authority for Goldsmith; and alleges that Miss Figueroa's services were useful in various specified respects.

For an "Affirmative Defense" respondent repeats in narrative form and in greater detail substantially what appears in the affirmative allegations of his answer to the petition, and concludes:

> "I state unequivocally that at all times I acted properly, for the best interests of my client, and with full regard for the ethical and legal obligations of an attorney, and never knowingly or intentionally contravened any of the Canons of Ethics."

Respondent did not testify personally in this proceeding. His counsel advised that respondent is in Florida, too ill to appear here, and counsel for petitioner agreed that respondent has been found to be in such condition when examined in Florida by a doctor on petitioner's behalf. In lieu of respondent's testimony here, both parties agreed to rest on the testimony given by respondent in the hearings before petitioner's Grievance Committee in June 1969, which included, among other things, some testimony given by respondent at interviews with counsel for petitioner prior to the making of the charges, and also statements contained in a Bill of Particulars sworn to and served by respondent in an accounting action brought against him by Rosenstiel.

There is no testimony from Rosenblatt, to whom respondent attributes responsibility for practically all that was done in reference to the Mexican situation: Rosenblatt died in May 1968, which was prior to the commencement of the hearings before petitioner's Grievance Committee.

The Evidence

Respondent knows Lewis S. Rosenstiel since the "early 50's" and had represented Rosenstiel in a matrimonial difficulty with his second wife, Lenora, in which respondent states he brought about a reconciliation.

In September or October 1961, Rosenstiel consulted respondent with respect to his then marriage to Susan, his fourth wife; he told respondent that he "couldn't take it any more, and would have to get rid of her". Respondent testified that he told Rosenstiel he was "foolish" about it, and that "it would be exceedingly expensive," to which Rosenstiel replied: "It doesn't make any difference. I will spend five million dollars, ten million dollars, whatever it is. Spend it, get it done."

Respondent testified that his relations with Rosenstiel had been "very close", both socially and professionally, until he was superseded by the firm of Saxe, Bacon & O'Shea in March 1963.

Respondent testified that when the "paper work" became "so great" that he could not handle it, he engaged Sol Rosenblatt, whom respondent regarded as an expert in Mexican legal matters, and also Mrs. Korn, respondent's former secretary, and by that time a practicing lawyer, to assist him in handling the Rosenstiel matter.

The "whole Mexican situation," said respondent, had been delegated to Rosenblatt, who was given "carte blanche" in reference to it.

Respondent testified that he discussed with Rosenblatt and Mrs. Korn the fact that in 1954, prior to her marriage to Rosenstiel, Mrs. Rosenstiel had been divorced in Mexico from her former husband, Felix Ernest Kaufmann ("Felix"), and this, said respondent, became more and more significant when he, Rosenblatt and Mrs. Korn concluded that they had no basis on which to get rid of Mrs. Rosenstiel in either the New York or the Connecticut actions which had been commenced by Rosenstiel and were still pending against her on the ground of cruel and inhuman treatment. The only alternative, said respondent, was the possibility of "knocking out" the divorce which Mrs. Rosenstiel had procured from Felix, her former husband, in Mexico.

When respondent asked Mrs. Korn her opinion of the validity of the Kaufmann divorce, she said it would depend on the legality of the procedures which had been followed there, and she was then sent to Mexico to see what could be discovered from the court files there.

There are three written reports by Mrs. Korn with respect to these trips.

The first report, dated November 30, 1961, covering a two-day trip commencing November 26, 1961, states that Mrs. Korn had interviewed Mr. McAlinon, an attorney in El Paso, Texas, and a Mr. Garza, a Mexican attorney, and concludes: "It would appear from the information I was able to get that we would have at least a 50% chance of setting aside the Mexican decree if we can get jurisdiction in the annulment action in Connecticut and the complaint is amended," and she could not "give any opinion on our chances in New York" until she receives from McAlinon and Garza certain data which she had requested them to procure.

The second report covers Mrs. Korn's trip to Mexico commencing January 18, 1962 and ending January 30, 1962. It states that, in the course of that visit, Mrs. Korn conferred with, among others, Mr. Enrique Correa, who advised her that, for various reasons given in the report, the divorce decree could be set aside; that it would be "absolutely" impossible to get a "government official" to institute the proceeding without notice and on his own motion [a course Rosenblatt had said could be taken]; that the plaintiff would have to be Rosenstiel and the parties to the Kaufmann divorce would have to be the defendants and given notice, and, including the appeals to be anticipated, the action would go on for two or three years. She reports: "Mr. Correa impressed me considerably. He grasped the situation immediately and perceived most of the flaws in the transcript at first glance" and, "after reporting to New York"—she previously, in the report, referred to having spoken to respondent on the phone and being told "to proceed"—she retained Correa to get the case to set aside the Kaufmann decree in motion as soon as possible.

Mrs. Korn's third report covers a trip from January 30 to February 1, 1962. It records a conference with Edward Correa—nephew of Enrigue—who said he had spoken to Judge Figueroa, who had signed the Kaufmann decree, and he did not think the "defects" would be sufficient to invalidate the decree in the Juarez courts, but there was a "good chance" of succeeding in an action brought in the Federal Court—a view, said Edward, with which his uncle, Enrigue, did not agree. Mrs. Korn also reported of what she thought was a difference in signatures in various papers in the court file, which she had examined, and she had authorized Correa to get an expert's opinion. She reports that she told Correa "we" would "make a decision" as soon as we had Correa's and

the handwriting expert's reports, "because we have a proceeding pending and a witness awaiting our decision so that we will know whether or not he has to come to Mexico".

Mrs. Korn testified that she discussed her reports with respondent, when in New York.

On February 2, 1962, Mrs. Korn wrote the Attorney General of Mexico that she was a New York lawyer and that, at the request of the law firm of Javits and Javits she had examined the Kaufmann divorce file in the Juarez court; that she had found six "fundamental defects and jurisdictional irregularities"—describing them —and closed: "I concluded that a fraud was committed upon the court and trust you will so advise the proper authorities so that they may investigate, and if they find the foregoing to be factual, take such action as they deem appropriate in the circumstances."

To that letter Mrs. Korn received no reply.

I have described, in some detail, the steps taken up to this time because they show that until then the matter had been handled in Mexico in a lawyer-like way: it had been discussed on its merits, with lawyers qua lawyers.

Respondent testified that when he reported to Rosenstiel that Correa had advised that the only way to proceed in Mexico would be by an action in which Rosenstiel would have to be the plaintiff, on notice to the parties to the Kaufmann divorce case, who would have to be the defendants, and that such an action might take two or three years, Rosenstiel "steamed to the roof". Such an action would have been unpalatable to respondent, too, not only because of the time it would take, but because he wanted a judgment against Mrs. Rosenstiel without notice to her,—a judgment of which she would have no knowledge, and which could be "sprung" on her as a surprise in Rosenstiel's pending New York action against her.

And then we find a complete change in the Mexican dramatis personae.

Mrs. Korn was sent on another trip to Mexico on February 28, 1962; it lasted until March 8, 1962. Of this one, by far the most important of her trips, there is no written report. She said she ceased making written reports after the last preceding trip because she found it too burdensome.

On this occasion, she called on Luis Siqueiros, the man to whom she had written in his capacity of Attorney General and who had not answered her letter. He was also Lieutenant Governor of the State of Chihuahua, Mexico.

Respondent testified that Rosenblatt told him that Siqueiros was permitted to practice law privately.

Mrs. Korn's testimony reads:

> "Q. And in what capacity were you going to meet Mr. Siqueiros? A. As a lawyer. He was a lawyer, too.
>
> Q. As a private practitioner? A. Well, he happened to be in government at that time, but he had a large law office in Mexico City, and he was a lawyer and, as I understood it, he was extremely competent. And in view of the fact that I had been advised by Sol Rosenblatt that in order to proceed anywhere in Mexico, it was necessary to do it through proper officials because unless you do it that way, you just never get any place, they wouldn't pay the least bit of attention to you.
>
> Q. What do you mean by proper officials? A. Well, I know it sounds peculiar to us, but later I found he was absolutely right. If you want to walk into a lawyer down there, you can't do it because a good lawyer won't have any part of you unless you have been sent down there by someone whom he knows or someone who he wants to do something for. It is a very strange country."

• • •

"Q. So then you were seeing him as an official in the Mexican government, correct? A. I was seeing him in both capacities because I had been advised he could help us in both capacities."

Mrs. Korn testified that she knew, before she left Mexico on the 28th, that she was to see Siqueiros there —Rosenblatt had made the arrangement—and that when she spoke to respondent on the day before she left she "must have" discussed the trip with him, but, she said, she did not discuss with him her upcoming visit with Siqueiros. She also testified that neither respondent nor anyone else told her, before she left, that Siqueiros was working for Javits and Javits.

Mrs. Korn testified that as she was about to leave the office on that trip, Rosenblatt introduced her to one Carmine Lopez Figueroa ("Carmen"), whom she had never before met, as "an old friend of his".

Respondent testified that, on Rosenblatt's advice, Miss Figueroa had been retained at a salary of $100 to $200 a week.

"He [Rosenblatt] thought we ought to have somebody who was well acquainted with the whole Mexican scene, and coming generally under the head of public relations; it was a knowledgeable person, and that part of the world had its own way and she was very important in that sort of thing. • • •Well, generally, I got the general flavor of it, and that was you had to be well represented there; the aura of your representation was as important as the representation itself, and she was a good person to develop that • • • Also, that she was very greatly in touch with things that were going on there. In one word, it was a strange, strange world. • • • I would say that he [Rosenblatt] told me she was needed to carry on in Mexico, but whether he told me she was important

in obtaining the [Goldsmith] decree I couldn't tell you. I don't know. He may have told me."

Respondent said in his Bill of Particulars in the Rosenstiel accounting action (" the Bill of Particulars") that Figueroa's services were "public relations", but did not know what he meant by "public relations"—all he knew, he said, was that Rosenblatt said she had to be retained for "public relations"—a "catch phrase" which he "accepted". He said he could not give a description of what she was retained to do.

The fact is that Carmen worked for Amelia LeDun, a member of the Mexican President's Cabinet. The testimony with reference to LeDun reads:

"Q. What did she do? A. Well, she gave a party down there, at which all the—a lot of bigwigs were present who knew I represented Mr. Rosenstiel in this situation, and for whatever that might be worth, down there it is supposed to be worth a great deal.

Q. The fact that she gave a party for you? A. That's correct.

Q. That was supposed to help Mr. Rosenstiel in the annulment? A. That's right. It helps sustain the annulment. • • • That's my supposition.

Q. How did you think that was going to contribute toward the sustaining of the annulment? A. I don't know a thing about it. All I can tell you is that I was told this is the way to do business in Mexico.

Q. What did she do in New York for the $2170 which is the amount of the St. Regis bill? A. Whatever it was, we paid it. For instance, she had me meet the Mexican Ambassador, who is now Secretary of Foreign Affairs in the Mexican Cabinet. She did many things to sort of do whatever she is supposed to do in accordance with

directions I got from Rosenblatt, or the way it was done with the approval of Rosenblatt.

• • •

Q. Can you tell us of any one thing that this Senora Amelia Castillano LeDun did while in New York and you picked up this $2100 bill and charged it to Mr. Rosenstiel that benefited Mr. Rosenstiel? A. I couldn't tell you.

Q. Can you tell anything she did which was not being done by Carmen Lopez Figueroa or by her sister, Maria Louisa Lopez Figueroa DeGray, who were both creating good will? A. I couldn't tell you that."

Elsewhere respondent said:

"As far as I'm concerned, she didn't do anything."

and

"Miss Figueroa handled all that, and she said it was the thing to do, and we did it."

A check for $3000 was given to Carmen in June 1962 and charged to "public relations *re* Mexican action," allegedly as a contribution to a charity in which Amelia LeDun was interested.

The Bill of Particulars shows the following payments (cents omitted) to Carmen, the purpose stated below being taken from a column of the Bill headed "Reasons and Purposes":

Checks directly by Javits and Javits:

6/15/62 Fee, public relations, Mexican action	$ 3,000
3/22/63 Travel expense, telephone, public relations, misc.	1,938
4/12/63 Travel expense, telephone, public relations expense, misc.	320

Checks of Sol Rosenblatt, out of moneys received by him from Javits and Javits, and recorded in the Bill of Particulars as "redisbursed" public relations, Mexican action	8,435
Travel, hotel, telephone, public relations, miscellaneous expense	7,886
In addition, the evidence established that Javits and Javits issued two checks, aggregating $10,000 for payment to Carmen for "public relations, Mexican action, fees and disbursements," one of which, for $4035, was issued directly to her, and the other, for $5965, was issued to Mrs. Korn, the proceeds thereof to be turned over by her to Carmen in installments, when requested by Carmen.*	10,000
	$31,579

Coming back to Mrs. Korn's last mentioned trip to Mexico: at the time Rosenblatt introduced Carmen to her, Mrs. Korn testified, he told her that Carmen had come up from Mexico at his request, "simply" to accompany Mrs. Korn to Mexico and introduce her to Siqueiros. If Mrs. Korn testified truthfully, Rosenblatt did not tell her the truth.

Mrs. Korn and Carmen traveled to Mexico together, and while there Mrs. Korn had "several" conferences with Siqueiros, in which, she testified, they discussed the letter she had sent him as Attorney General, and Rosenblatt's theory that the Kaufmann decree should be set aside without the necessity of notice to any of the parties

*Mrs. Korn testified this was done at Carmen's request, her reason being that she had large indebtedness here and no bank account here. Mrs. Korn also testified that after making a few small payments to Carmen, Mrs. Korn did not care to continue, and gave the balance to Carmen.

to it. Mrs. Korn said she could not separate what was said at each conference, but one thing she did know: at none of them was there any reference to a retainer.

Why it had been found necessary to bring Carmen up here from Mexico, only to meet Mrs. Korn and take her back and introduce her to Siqueiros, seems to make no sense, until we learn, according to Mrs. Korn, that while she and Carmen were seated in Siqueiros' outer office, waiting to see him, Carmen disclosed to Mrs. Korn that Rosenblatt had given Carmen a check to Siqueiros' order for $10,000, which she was to deliver to him. Mrs. Korn testified that there had been no reference to it, and she knew nothing about it, until that moment, and there was no reference to it during the conference with Siqueiros.

Mrs. Korn would not admit that Carmen delivered the check to Siqueiros: she would say only that she knew Carmen had the check; that Carmen told her that Rosenblatt had given it to Carmen for delivery to Siqueiros, and that it "cleared". "So it must have been given to him. That's all I know. Other than that I can't remember."

Although about a dozen other Mexican lawyers were paid by respondent for services rendered at one time or another in connection with the Mexican situation, every one of them was paid by a check to his order, drawn either by respondent or by Rosenblatt out of funds provided by respondent. Not so, however, the $10,000 check to Siqueiros: this was a check drawn to his order by Chemical Bank & Trust Co., which had been purchased from the bank on February 26, 1962—two days before Mrs. Korn left for Mexico—with a Javits and Javits check for $10,000 to the bank, signed by respondent, and for which Javits and Javits paid the bank an issuing charge of $12.50.

Not only would the Javits and Javits books show no issue of the check to Siqueiros, but there is no evidence of any letter of transmittal of the bank check to him.

Respondent testified, "I think there was some arrangement by which they wanted a bank check rather than a straight check," and

> "Q. Who wanted a bank check? A. I don't recall."

Evidently no one wanted a bank check when three checks were sent to Siqueiros for legal services in April and May: these were "straight checks" to his order, but the amounts were much more modest than the February check: all three aggregated $5500.

Mrs. Korn again conferred with Siqueiros "several days" after the one in which the bank draft was given to him, and at the conclusion of it he told Mrs. Korn that he would let her know "in a few days" whether or not he could "do anything" in the matter.

Mrs. Korn testified that at the time of her conference with Siqueiros he had not agreed that he would get into the case, and

> "Q. And yet, wasn't it on that occasion he was given the $10,000? A. I suppose so. As I said, I don't recall. I don't know whether he was given the check when we were in his office that day, or just how it was given to him. I just don't remember. I don't recall seeing it given to him.
>
> Q. But the young lady told you she had it for the purpose of giving it to him. A. That's right, and that it was to be given to him and I know that he got it but I don't know exactly how.
>
> Q. Well, at that time there was no thought, was there, that there would be an attack on any decree that Mr. Siqueiros was able to get, was there? A. No, there wasn't.

Q. What services then was it anticipated he would be paid for? At the time he gets the check he doesn't know whether he is going to go into the case and there is no other litigation in prospect, is there? A. Not in Mexico at that time.

Q. Did you make any inquiry along that line at all at that time? A. No, I didn't."

Mrs. Korn's next meeting with Siqueiros, after the one in which he received the $10,000 bank check, was "about a week later," and on that occasion, she testified: "He brought us an annulment decree of the original Kaufmann decree, which he stated was the result of an action that had been brought by a Mr. Gold—something or other—Goldsmith, and he turned it over to me," According to Mrs. Korn, Siqueiros "just said that [Goldsmith] was some man who was interested in the Kaufmanns and that he had come in and set aside the decree," and that it was not based on any of the irregularities she had found on her examination of the court file.

Mrs. Korn testified that she had never heard of any Goldsmith before.

On returning to New York, Mrs. Korn turned the Goldsmith decree over to respondent.

Goldsmith's petition, dated January 31, 1962, was addressed to the Civil Court, First Instance, of the District of Bravos. It states further that he had not been called to the Kaufmann divorce case and the decree therein had not been published as required by law, and that "by mere accident" he had learned of the decree "only a few days ago"; that "having common business with the spouses Kaufmann," "he suffered great damage" from the incorporation of their Separation Agreement in the divorce decree, and that the "spouses, conniving together, have tried to prejudice my interests". He prayed that "all the proceedings at said trial, including the Separation Agreement which the spouses plotted against me and which was incorporated in the decree, be declared null

by the full force of the law" because of "the existence of several defects as to the procedure followed in said trial and because the decree was not published at all".

The petition contains no description of, or reference to, what "business" Goldsmith had in "common" with the Kaufmanns, or any identification of the "defects" in the trial; the Separation Agreement was not annexed, nor is there any statement of wherein, or how, anything in it could have "prejudiced" Goldsmith's "interests".

The Goldsmith proceeding was decided by a decree dated February 6, 1962, which states that Goldsmith "appeared" before the court "through a brief" dated January 31, 1962, and after describing the contents of his petition, finds: First, that since Mrs. Kaufmann's attorney had appeared for her in what was a "necessary divorce" case, whereas she had authorized him to appear only in a "mutual consent divorce," he had exceeded her authority and the divorce court had had no jurisdiction; second, that since the documents from "abroad" had not been "duly authenticated", they "yield no legal proof before the court of this state," and third, that there have been "no legal effects" from the divorce decree because a certified copy of it had not been published. Consequently, the Goldsmith decree holds, all the judicial proceedings relating to the divorce decree, including the judgment therein, "are declared null and void" and the parties "are remitted to the status as it existed before the institution of the divorce proceeding declared annulled by this judgment".

Mrs. Korn testified before the Grievance Committee that respondent told her that the $10,000 was paid to Siqueiros "as a retainer for services • • • for legal services Mr. Siqueiros was expected to render at some subsequent date when we got into litigation in Mexico": that respondent "felt that at some point along the way, Mrs. Rosenstiel must be made aware of this annulment [of the Goldsmith] decree and certainly there were going

to be appeals, you know, it was going to be contested". She then said she "should not have said that" because she does not remember "the exact conversation".

Respondent's testimony in regard to Siqueiros' function in reference to the Goldsmith decree was not consistent. At one point he testified that the decree came as a surprise to him, i. e., that the Correa firm had been retained to bring a proceeding to nullify the Kaufmann divorce,

> "but the whole thing became academic when the [Goldsmith], decree out of a clear sky, came down."

In his examination before trial in the Rosenstiel accounting suit, respondent testified that Siqueiros had not been retained to procure the Goldsmith decree, but to sustain it, if it should be attached by Mrs. Rosenstiel. Thus,

> "Q. Sustaining it, as opposed to obtaining it? A. That's correct.
>
> Q. He had nothing, as far as you know, he had nothing to do with obtaining it? A. That's right.
>
> Q. And if he had anything to do with it, you were never told of that? A. That's correct."

Finally he said: "Seems to me he was retained for the purpose of obtaining and sustaining"—and yet, as we shall see, when the need for "sustaining" it arrived, an entirely different attorney was retained.

At one place, respondent testified that he had retained the counsel to annul the Kaufmann divorce decree.

Respondent also testified on his examination before trial that:

> "By total coincidence, a person, or a nonexistent person, whoever he might be, Samuel Goldsmith, appeared in the District Court of Chihuahua and obtained annulment, unbeknownst to me, of the Kaufmann v. Kaufmann decree.
>
> Q. That is your testimony under oath? A. That is my testimony."

But respondent evidently had his misgivings about the validity of the Goldsmith decree. In a conference with the attorney for the Grievance Committee, respondent testified that if the Goldsmith decree were attacked, "we wanted to be sure it would be defended by a proper party"—a "party in interest"—which Rosensteil was not. Goldsmith, said respondent,

> "may not be a proper party, so far as we knew. It looks funny to get a guy off the street to start an action. You see, it didn't make sense, but a lot of things don't make sense."

Yet, when Siqueiros conferred here with respondent shortly after the Goldsmith decree, respondent made no effort to find out anything about Goldsmith: there was nothing to discuss about it, respondent testified, the decree was "here". Nor did respondent ever make any other effort to find out whether or not a Samuel Goldsmith ever existed, and, if so, what status he had to get into the matter—and this despite the fact that Mr. Rosenstiel's attorneys had submitted papers in his accounting action charging respondent with having "engineered and participated in the fraudulent events in Mexico".

In order to be on "better and safer grounds" if Mrs. Rosenstiel should attack the Goldsmith decree, respondent got powers of attorney from the attorneys who had represented the parties in the Kaufmann divorce action, at a cost of $5000, and also one from Felix Kaufmann.

Mrs. Rosenstiel brought a proceeding to set aside the Goldsmith decree—an "amparo".

In opposition appeared the law firm of Lopez, Figueroa [Carmen's brother] & Valenzuala, as attorneys for Goldsmith and Felix Kaufmann. The Kaufmann power of attorney had been sent to Valenzuala by respondent.

Respondent testified that Valenzuala told respondent that he, Valenzuala, had appeared for Goldsmith without authority, and that the Goldsmith for whom he had ap-

peared was not the one who was the "original petitioner". Respondent admitted that it would be reasonable to believe that the Valenzuala firm represented to the court that their client "was the same Mr. Goldsmith who had appeared in the nullification [of the Kaufmann divorce] proceeding".

Referring to Valenzuala, respondent testified:

> "He appeared directly, indirectly perhaps, for Mr. Goldsmith, but actually he was appearing for Rosenstiel. The technical requirements, perhaps, were that he is to appear for the second Mr. Goldsmith, but actually we had nothing to do with Goldsmith at all. We were there for the purpose of appearing for Mr. Rosenstiel."

Rosenstiel was, of course, no party to that proceeding, and no one here appears to know, to this day, whether or not there was ever a first Samuel Goldsmith, much less a second.

Despite all this, respondent testified that what Valenzuala had done

> "did not amount to a fraud, as I was told; it was a convenience, not a fraud."

Respondent testified he was "shocked" when he learned of it; he thought it was "kind of stupid" on Valenzuala's part; he "chided" him for having done it, but

> "I could not criticize him * * * It was a way of life * * * What could I have done about it, anyway. To me it was a strange way of practicing law down any place, but they did it. * * * Down there, I was told that no matter what you hear, no matter what you learn, whatever it is, it might be the way of life down there."

Evidently it did not occur to respondent that one thing, at least, that he should have done was to terminate Valenzuala's retainer immediately, but he didn't. Though

what Valenzuala had done affected respondent's "trust and confidence" in that firm, he continued, with full knowledge of it, to retain them in the matter because, he said, the proceeding was based more on deficiencies in the divorce proceeding "than upon any particular person appearing". Indeed, respondent continued the retainer of the Valenzuala firm until respondent was superseded in March 1963, although respondent knew that Valenzuala had had no authority to appear in the case for anybody since December 1962, at which time Felix Kaufmann—the only person for whom Valenzuala had ever been authorized to appear—had revoked his power of attorney and had refused to reinstate it even after Mrs. Korn, on a visit to him in Switzerland, had sought to get him to do so.

All this legerdemain became the subject of an investigation by the then Federal Attorney General of Mexico: Valenzuala, said respondent, was "on the carpet"; he had the "problem" of explaining it and to "help [him] out" respondent accompanied Valenzuala to the Attorney General's office. The evidence here does not indicate what was shown in that investigation, or what the outcome of it was.

Mrs. Rosenstiel's "amparo" to set aside the Bravos court decree of February 6, 1962 sustaining the Goldsmith judgment, was decided by a decree dated November 27, 1962. After reciting the prior proceedings, the court held that the amparo was "affected * * * by illegality" in that Mrs. Rosenstiel, with knowledge of the acts of which she now complained, had failed to file the ampero within the time permitted by law, and had thereby "tacitly consented" to them, and "as a result the present action should be" and it was "dismissed".

According to a recital in that decree, "Juan Trevino Prieto" appeared by power of attorney "for the injured parties, Messrs. Samuel Goldsmith and Felix Kaufmann".

and respondent's Bill of Particulars in Rosenstiel's accounting action states that out of moneys given to Rosenblatt by respondent to be "reimbursed" Rosenblatt paid "Juan Prieto, Juarez, Mexico," $800 "associate counsel fee, Mexican action".

Mrs. Rosenstiel then took the case to the "Third Circuit Court" at Saltillo, Coahuila, which, in a decree dated May 10, 1963, "decreed" that in the protection of Mrs. Rosenstiel's "constitutional rights," the judgment of the Bravos court "is hereby set aside".

Respondent denied this was a "reversal"; he said it was a "default" which resulted from the fact that the attorney who superseded him "threw in the towel". The decree does not bear out that interpretation. A reading of it shows that the court considered the proceedings in the courts below, the contentions of counsel and the determinations there, and the law applicable to the issues presented—all in detail and at great length—before announcing its conclusion.

The last chapter of that litigation is found in a document dated May 28, 1963, in which the receipt of the last mentioned decree is acknowledged and

> "all the proceedings related to the incident raised by Mr. Samuel Goldsmith on January 31st 1962 are declared null and void and without effect * * * leaving valid all the proceedings followed in the Necessary Divorce instituted by Mr. Felix Ernest Kaufmann against Mrs. Susan E. Lessman Kaufman including the decree pronounced on October 2nd 1954, rendered executory on Oct. 6, 1954. * * *"

Character witnesses

Two character witnesses testified on behalf of respondent. Otto Koegel, Esq., an attorney admitted in 1931, is a member of the firm of Royall, Koegel and Wells. He

knows respondent for "more than thirty-five years," during which time, he said, their association has been "very close" and he has learned about respondent "professionally, socially, politically and otherwise" to a "very considerable degree".

"In my opinion," said Mr. Koegel, respondent's reputation" as a lawyer is "good, excellent".

Mr. Justice Samuel Gold, of our State Supreme Court, testified that he knows respondent "socially" over twenty years, and his reputation is "good".

BIOGRAPHICAL.

Respondent was born October 21, 1894. At the time he testified—(October 1968)—he said he had been married forty-three years and had two children, both married, one a son of thirty-eight, the other a daughter of forty.

Respondent attended Townsend Harris High School for one year, and then went to night school. He was graduated from Fordham Law School and, on December 22, 1922, was admitted to the Bar in the Second Department.

After six months in the law office of Jenks & Rogers, Esqs., respondent went into practice on his own. Prior to studying law, he had been in the "debt collection" business, and he reverted to that in his practice, which, he said, was an "extension" of his earlier activity as a "collector of bad bills". He then became active in bankruptcy and reorganization, and in "trade-association work" and became "interested" in both the economics and the legal aspects of the antitrust laws, on which subject, he said, he "wrote a couple of books".

Sol Rosenblatt became respondent's tenant in 1947.

Respondent testified that he ceased "active practice" about 1960 or 1961; that he is now "retired" and the practice is carried on by his son and four other partners and associates.

As previously noted, respondent did not testify in person here. His attorney stated that "he has a serious heart condition, coronary condition. He has had a cancer condition, which requires him to remain in a warm, temperate climate during the winter. As a result, he lives in Florida during a very substantial portion of the year." Moreover, his attorney stated, "I have also been informed by his physician that the stress of a hearing, of actually appearing and taking and confronting witnesses and so forth might be such that it would exacerbate his heart condition, and might lead to a fatality." His attorney also said that respondent "has a blood pressure condition which has been affecting him from time to time over the past three or four years". Mr. Franck, then appearing for petitioner, stated that he had had respondent examined by a physician "selected by the Florida Bar," who "at that time" confirmed "the findings". Mr. Linsky, who succeeded Mr. Franck as attorney herein for petitioner, said: "We do believe that he is a very ill man and that his being forced to testify or his testifying might be very crucial to his health."

Conclusion

In my opinion, the evidence leaves me no alternative but to find, as I do, that the charge has been sustained.

New York, June 9th 1970.

Respectfully submitted,

GEORGE TROSK
Referee

APPENDIX B.

In the Matter of BENJAMIN A. JAVITS, an Attorney, Respondent. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Petitioner.

First Department, January 5, 1971.

Attorney and client—disciplinary proceedings—respondent, attorney at law, guilty of professional misconduct in course of conduct tending to exert improper personal influence on courts, lack of candor and fairness with courts, fostering unjustified and questionable litigation and defenses, improper solicitation of employment, and conduct designed to bring dishonor on courts' administration of justice—respondent suspended from practice for period of three years.

Charges that respondent, attorney at law, "has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree" are sustained. The findings of fact and the report of the Referee sustaining the charges are confirmed. Respondent's unethical conduct included the paying out of large sums for the purpose of exerting influence on the part of public officials of Mexico to further the interests of his client. The evidence establishes serious professional misconduct in a course of conduct tending to exert improper personal influence upon the courts, in a lack of candor and fairness with the courts, in fostering unjustified and questionable litigation and defenses, in the improper solicitation of employment, and, in general, in conduct designed to bring dishonor upon the courts and on the administration of justice. Consideration being given to the general standing and good reputation of the respondent at the

Bar and in the community, and also to his advanced age, his demonstrated ill health, and his purported retirement from the active practice of the law, respondent should be suspended from practice for a period of three years.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York. Respondent was admitted to the Bar on December 11, 1922, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By order entered March 5, 1970, George Trosk, Esq., was appointed Referee to take testimony and report to this court.

John G. Bonomi of counsel for petitioner.

James H. Halpin and *Stanley S. Arkin* for respondent.

Per Curiam. The respondent was admitted as an attorney by proceedings taken in the Second Department in December of 1922. For many years, he has been engaged in the practice of law in this Department with his son and other partners and associates under the firm name and style of Javits & Javits. In this proceeding instituted by the petition of the Association of the Bar of the City of New York, the charges are that the respondent "has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree" divorcing Mrs. Lewis S. Rosenstiel from her former husband, Felix Kaufmann. The respondent interposed an answer denying the material facts alleged in the petition in support of the charge and the issues were referred for hearing and report to a Referee. Following the hearing of the allegations and proofs of the parties, the Referee has rendered a report sustaining the charges and his report has been filed with this

court. The petitioner now moves to confirm the report and prays that the respondent be severely disciplined.

The findings of fact and the report of the Referee are confirmed. Thereby it is established that the respondent, under a retainer by Mr. Rosenstiel, conducted an investigation and initiated steps leading to a vacatur of the Kaufmann (Mexican) decree of divorce. The respondent, although not retained by either of the parties to the Kaufmann decree, and acting under a retainer of his client, sought to obtain an unusually expeditious nullification of that decree. In this connection, substantial sums of money were paid to persons who were Mexican nationals, including to an Attorney General of a State in Mexico. The latter, who was allegedly retained as a practicing lawyer, was paid the sum of $10,000 to take proceedings for a vacatur of the Kaufmann decree. The payment, in the form of a bank draft purchased by respondent's firm, was delivered to the Attorney General by a Mexican laywoman who was employed by respondent as a person having some influence in Mexican affairs. About a week after the payment of the retainer to the Attorney General, upon petition of one "Samuel Goldsmith", a purported creditor of the Kaufmanns, the Attorney General delivered to respondent's representatives a decree (the Goldsmith decree) rendered by the Mexican court setting aside the Kaufmann divorce decree. The Goldsmith decree was obtained *ex parte* without notice to Mrs. Rosenstiel other than a posting on the bulletin board of the Mexcian court house. Respondent testified that he intended at an appropriate time to surprise her attorneys with the decree; that he would use it in a pending separation action before her attorneys learned of its existence and instituted proceedings to vacate it.

Eventually, Mrs. Rosenstiel did learn of the Goldsmith decree and brought an "amparo" proceeding to set it aside. However, fully aware that it had been obtained

without notice to her and that it was of questionable validity, the respondent proceeded in disregard of proper ethical standards, to continue to urge the efficacy of the decree. Without authority of "Goldsmith", he retained Mexican attorneys to appear in opposition to the amparo proceeding, and also solicited from Mr. Kaufmann a power of attorney authorizing them to appear for him. Incidentally, these attorneys, who appeared in opposition to the amparo proceeding without authority of the alleged original Mr. Goldsmith, purported to appear for a "second Samuel Goldsmith". When Mr. Kaufmann later revoked his power of attorney, the respondent sent a representative to Switzerland to contact him to see whether or not his action in revoking the original power of attorney "was irrevocable or whether he was still willing to have some representation".

The respondent's unethical conduct included the paying out of large sums for the purpose of exerting influence on the part of public officials of Mexico to further the interests of his client. An aggregate of $15,500 was paid to the Attorney General in connection with his alleged retainer as a private practitioner and as an alleged "associate counsel"; $10,000 was paid to a Mexican laywoman who was friendly to a member of the Mexican cabinet, the payment being made "for public relations, Mexican action, fees and disbursements"; $3,000 was paid as a contribution to a charity in which a member of the Mexican cabinet was interested in order to obtain "a favorite public relations climate"; a hotel bill of about $1,500 was paid to cover the charges of a stay in New York City of that same member of the Mexican cabinet; a sum of $5,000 was expended to obtain powers of attorneys from the attorneys who represented the parties in the Kaufmann divorce action, and also one from Mr. Kaufmann; and substantial sums were paid to the firm of attorneys in Mexico to oppose the amparo proceeding brought by Mrs. Rosenstiel.

The evidence, within the framework of the charges, does establish serious professional misconduct in a course of conduct tending to exert improper personal influence upon the courts, in a lack of candor and fairness with the courts, in fostering unjustified and questionable litigation and defenses, in the improper solicitation of employment, and in general in conduct designed to bring dishonor upon the courts and on the administration of justice (see canons 3, 15, 22, 27, 29, 30, 31 and 32 of the Canons of Professional Ethics).

The respondent's professional misconduct represents serious breaches of the Canons of Professional Ethics and warrants severe discipline as prayed for by the petitioner. However, in fixing the measure of discipline, we have given due consideration to the general standing and good reputation of the respondent at the Bar and in the community, and also to his advanced age, his demonstrated ill health, and his purported retirement from the active practice of the law. Under the circumstances, the repondent should be suspended from practice for a period of three years.

McNALLY, J. (dissenting in part). I dissent, in part, and vote to disbar. The record amply supports the report of the learned Referee, the Hon. George Trosk, in his conclusion that respondent attempted to perpetrate a fraud upon the Governments of Mexico and the United States by paying moneys to Mexican public officials and a Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree.

Respondent's answer to petitioner's charge letter admits the payments to Mexican public officials and a Mexican national upon which the charge is predicated, but denies any impropriety, contending that he had relied upon a lawyer associate, now dead, familiar with procedures in Mexico, who had approved all aspects of the Mexican litigation. The proof shows that respondent not only

acquiesced in the improper activities but participated in many aspects. His failure to conduct any investigation into the circumstances, even when faced with charges that he engineered a fraud, confirms his awareness of the improprieties and his sanction of them. This is further demonstrated by the lack of candor which characterizes his testimony before petitioner's Committee on Grievances, the inconsistent answers he gave when questioned concerning the underlying events, plus his inability to furnish any legitimate explanation for the role played by the various Mexican nationals to whom he made payments on behalf of his client. The fact that respondent relied upon a lawyer associate, now dead, is wholly immaterial, for his acquiescence and participation in the procuring of a fraudulent decree, nullifying the Kaufmann divorce, was improper, whether done in concert with others or alone.

Respondent's client was anxious for results. His own testimony shows the client, Lewis S. Rosenstiel, said in substance that money was no object to get rid of his fourth wife. The respondent testified that Rosenstiel told him "It doesn't make any difference. I will spend five million dollars, ten million dollars, whatever it is. Spend it, get it done."

While an ancillary proceeding called "Amparo" was pending in the federal courts of Mexico, as distinguished from the State courts of Chihuahua, the respondent paid large sums to a Miss Figueroa, a non-lawyer, to be used as a contribution to a charity in which a Miss Ledon, a member of the Mexican cabinet, was interested. This in order to obtain a so-called favorable public relations climate on behalf of his client. This sum was ultimately charged to the client as a disbursement in the Mexican action. Thereafter respondent paid Miss Ledon's hotel bill at the Hotel St. Regis in New York in a substantial amount which he charged to his client for public relations

related to the Mexican litigation. Respondent could give no explanation for these payments and their relation to the Mexican action other than to state that at one time Miss Ledon had given a party at which he had occasion to meet important Mexican officials including many of the Judges in the federal court in which the ancillary proceeding was pending.

The fact that respondent did not physically sign a $10,000 check payable to Chemical Bank New York Trust Company for the purchase of a $10,000 bank draft payable to Jose Luis Sequerios, then Lieutenant Governor and Attorney General of the State of Chihuahua, is immaterial. The check was signed by one of his partners, named Held, and respondent has repeatedly testified that he authorized the payment of the $10,000 to Sequerios. Since he authorized the payment, all inferences drawn by the Referee from the payment to Sequerios may fairly be imputed to the respondent.

Respondent argues that neither of his legal associates was charged with misconduct. This is wholly immaterial. In a disciplinary proceeding, it is not for the respondent to argue that disciplinary proceedings should have been brought against others. That the two lawyers, one of whom is now dead, were conspirators in acts of professional misconduct, does not redound to the benefit of any one of them if the fellow conspirator was not charged. The question of whether the charges against respondent have been sustained must be based on the record and nothing else.

In addition to the misconduct confirmed by the majority, the Referee found the following and the record establishes the same.

Respondent was of the opinion his client had no basis for a divorce either in New York or Connecticut. Nevertheless, Lewis S. Rosenstiel was adamant—he "couldn't take it any more, and would have to get rid of her (his wife)." Moreover, Rosenstiel was willing to spend five

to ten million dollars toward that end. Respondent advised the only possibility was the nullification of Mrs. Rosenstiel's Mexican divorce.

Mrs. Korn, an associate of respondent, was charged with the duty of looking into the Mexican divorce proceedings and render her legal opinion thereon. Between November and February, 1962, Mrs. Korn made trips to Mexico, examining records and consulted various Mexican attorneys. She rendered three reports thereon. The substance was there were possible grounds for vacatur of which Rosenstiel might avail himself. However, the Mexican attorneys were of the opinion that Rosenstiel was required to institute the necessary proceedings, on notice to his wife and her former husband, which would entail at least two years. Respondent conveyed this opinion to his client, who, in the words of the respondent "steamed to the roof".

Mrs. Korn made another trip to Mexico on February 28, 1962. She rendered no written report thereon. Prior thereto, on February 2, 1962, Mrs. Korn wrote to Luis Sequerios, the Attorney General and the Lieutenant Governor of the State of Chihuahua, requesting, on behalf of respondent's firm, that he take the appropriate action indicated by six allegedly jurisdictional irregularities in respect of the Mexican divorce decree of Mrs. Rosenstiel obtained by her former husband, Felix Kaufmann.

Prior to Mrs. Korn's letter of February 2, 1962, there was presented to the Civil Court of the District of Bravos, City of Juarez, State of Chihuahua, the petition of one Samuel Goldsmith, dated January 31, 1962, purporting to be a creditor of the Kaufmanns, which alleged invalidity of their divorce by reason of failure to publish it in the official newspaper of the State of Chihuahua. After posting of the notice of the Goldsmith proceeding for the period of three days in the courthouse in Juarez, a decree dated February 6, 1962 was made declaring null

and void the Kaufmann divorce decree dated October 2, 1954.

Mrs. Korn's trip to Mexico on February 28, 1962 was for the alleged purpose of seeking the aid of Sequerios to attack the Kaufmann divorce decree on the basis of the alleged jurisdictional irregularities. It is indisputable that the Goldsmith decree vacating the divorce decree had previously been entered. Hence, the alleged purpose of Mrs. Korn's meeting with Sequerios had been fully accomplished prior thereto. The assigned reason for the meeting is inconsistent with the indisputable record of the Goldsmith proceeding and, therefore, incredible as a matter of law.

The documentary evidence clearly establishes the purpose of the meeting with Sequerios was to compensate him and a non-lawyer for their improper efforts, covert and off record, in procuring or causing the entry of the Goldsmith decree; it also establishes that Mrs. Korn's alleged letter of February 2, 1962 did not cause the commencement of the Goldsmith proceeding on January 31, 1962.

Mrs. Korn testified she was introduced to Miss Carmen Lopez Figueroa, a Mexican laywoman, associated with Amalia Ledon, a member of the Mexican cabinet, on February 27, 1962. The introduction was made by Mr. Rosenblatt, respondent's co-counsel and office associate. Mrs. Korn was informed Carmen would introduce her to Sequerios. Allegedly unknown to Mrs. Korn was the fact that Carmen had in her possession a bank check dated February 26, 1962, purchased by respondent's firm with his authority, payable to Sequerios. Said check was delivered by Carmen to Sequerios out of the presence of Mrs. Korn. About one week later, Sequerios delivered the Goldsmith decree to Mrs. Korn in Mexico which she brought to the respondent on or about March 8, 1962. At that time, payments in the total

sum of $10,000 were made to Carmen. Part was by check for $5,965 payable to Mrs. Korn, dated March 8, 1962, which sum was paid out by her on the order of Carmen.

Other payments made by respondent's firm for the account of Rosenstiel at or about the Goldsmith decree are:

February 2, 1962 to Mrs. Korn	$ 2,000
February 14, 1962 to Sol A. Rosenblatt	$25,000

The record also establishes Goldsmith was not a creditor of the Kaufmanns and unknown to them. In the subsequent "Amparo" proceeding by Mrs. Rosenstiel to vacate the Goldsmith decree, he did not appear. Instead, another, and possibly fictitious, Goldsmith purported to appear and did defend the "Amparo" proceeding through attorneys retained by respondent for and in behalf of his client.

Respondent's admitted intention was to withhold from Mrs. Rosenstiel and her attorneys knowledge of the Kaufmann decree until it was introduced in evidence in the New York suit.

Respondent was superseded by other attorneys during March, 1963. Thereafter his client sought an accounting relative to the disbursement of $410,000 allegedly disbursed by respondent in his behalf. Various explanations were given by respondent in the accounting proceeding and before the Committee on Grievances as to the circumstances surrounding the Goldsmith decree. At one time, respondent testified he had no knowledge of the Goldsmith decree until after its delivery in Mexico to his associate, Mae Korn, the latter part of February, 1962 and her return to New York on or about March 8 or 9, 1962. In the accounting proceeding, respondent's testimony is that he was mistaken in testifying he did not know of the Goldsmith decree until he received a copy of it.

The record clearly establishes that the respondent's client desperately desired to sever the bonds of matrimony with his fourth wife; that the annulment of her Mexican divorce decree from Kaufmann was advised by respondent and eagerly sought by respondent's client alone and no other; and that the persons responsible or contributing to the Goldsmith decree were sought out and compensated by or with respondent's knowledge and consent, and include Mexican officials, to whom payments were covertly made because they were in the nature of bribes.

The unprofessional conduct of the respondent attending the defense of Mrs. Rosenstiel's "Amparo" proceeding is set forth in the *Per Curiam*.

I find no mitigating circumstances. Respondent knowingly embarked on a course of professional misconduct in compliance with the demands of his client. He was motivated solely by monetary reward and his conduct evinces professional irresponsibility.

For these reasons, and on all the grounds stated in the report of the learned Referee, I vote to sustain the findings *in toto* and disbar the respondent. (*Matter of Farrell*, 27 A. D. 2d 61.)

EAGER, J. P., CAPOZZOLI, MCGIVERN and MARKEWICH, JJ., concur in *Per Curiam* opinion; MCNALLY, J., dissents in part in an opinion.

Respondent suspended from practice as an attorney and counselor at law in the State of New York for a period of three years, effective February 5, 1971.

APPENDIX C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 5, 1971.

Present:

Hon. Samuel W. Eager,
Justice Presiding.
Hon. Louis J. Capozzoli,
Hon. Owen McGivern,
Hon. Arthur Markewich,
Hon. James B. M. McNally,
Justices.

In the Matter

of

Benjamin A. Javits,

An Attorney.

M-4353

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on February 13, 1970, a petition containing charges of professional misconduct against the above-named respondent, Benjamin A. Javits, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 11th day of December, 1922, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorneys, James

H. Halpin, Esq. and Stanley S. Arkin, Esq., and having interposed an answer to said petition, duly verified February 2, 1970, and the Court having duly made and entered an order on March 5, 1970, appointing George Trosk, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated June 9, 1970, and was filed in the office of the Clerk of this Court on June 16, 1970;

And the petitioner thereafter and on October 19, 1970, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified October 30, 1969, the affidavit of John G. Bonomi, Esq., annexed thereto, sworn to October 28, 1969, the notice of presentation of said petition, dated October 30, 1969, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified February 2, 1970, the order of this Court, dated March 5, 1970, appointing George Trosk, Esq. as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on March 5, 1970, the report of George Trosk, Esq., the Referee herein, dated June 9, 1970, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on June 16, 1970; and upon reading and filing the notice of motion for an order confirming the report of the referee and adjudging the respondent guilty of professional misconduct, dated June

22, 1970, with proof of due service thereof, and after hearing Mr. John B. Bonomi for the motion, and Messrs. James H. Halpin and Stanley S. Arkin opposed, and due deliberation having been had thereon and upon the *Per Curiam* Opinion of this Court filed herein; and the Court having found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby

ORDERED that the report of George Trosk, Esq., the Referee herein, filed in the office of the Clerk of this Court on June 16, 1970, be, and the same hereby is, confirmed; and it is further

ORDERED that said Benjamin A. Javits be and he hereby is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of three years, effective February 5, 1971, and until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of three years upon furnishing satisfactory proof that during said period he has actually refrained from attempting to practice as an attorney or counselor-at-law and has otherwise properly conducted himself and has fully complied with Title 22, Section 603.14 of the Rules of the Appellate Division, Supreme Court, First Judicial Department, annexed hereto and made a part hereof; and it is further

ORDERED that said Benjamin A. Javits be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, for a period of three years, effective February 5, 1971, and until the further order of this Court; and it is further

ORDERED that said Benjamin A. Javits be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority for a period of three years, effective February 5, 1971, and until the further order of this Court; and it is further

ORDERED that said Benjamin A. Javits be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, for a period of three years, effective February 5, 1971, and until the further order of this Court. [One of the Justices dissents in part in an Opinion.]

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX D.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 18th day of March, 1971.

Present:

Hon. Samuel W. Eager,
Justice Presiding,
Hon. Louis J. Capozzoli,
Hon. Owen McGivern,
Hon Arthur Markewich,
Hon. James B. M. McNally,
Justices.

In the Matter

of

Benjamin A. Javits,

An Attorney.

M-5771

The above named respondent having moved for leave to appeal to the Court of Appeals from the order of this Court entered on January 5, 1971.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of James H. Halpin in support of said motion, and the affidavit of Martin J. Linsky in opposition thereto, and after hearing Mr. James H. Halpin for the motion, and Mr. Martin J. Linsky opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs. The appeal lies as a matter of right.

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX E.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the the City of Albany on the Thirteenth day of May A. D. 1971.

Present:

Hon. Stanley H. Fuld,
Chief Judge, presiding.

1 Mo. No. 399

IN THE MATTER

of

BENJAMIN A. JAVITS, an Attorney,

Appellant.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the grounds that the Appellate Division dissent is not "on a stated question of law in favor of the party taking such appeal" (CPLR 5601 [a][i]) and that no substantial constitutional question is directly involved.

Appellant, if so advised, may move for reargument of his appeal in the Appellate Division if he believes, as he asserts, that some of the charges sustained were found without adequate notice to him.

A copy

GEASON KIMBALL
Deputy Clerk

(Seal.)

APPENDIX F.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 14, 1971.

Present:

Hon. Louis J. Capozzoli,
Justice Presiding.
Hon. Owen McGivern,
Hon Arthur Markewich,
Hon. James B. M. McNally,
Hon. Samuel W. Eager,
Justices.

In the Matter

of

Benjamin A. Javits,

An Attorney.

M-6999

The above-named respondent having moved for leave to reargue Motion No. 5771 of February 8, 1971, which motion was denied by order of this Court entered on March 18, 1971, and for leave to appeal to the Court of Appeals from the aforesaid order of this Court.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of James H. Halpin and Benjamin A. Javits in support of said motion, and the affidavit of Ronald Eisenman in opposition thereto, and after hearing Mr. James H. Halpin for the motion, and Mr. Ronald Eisenman opposed,

It is ordered that said motion be and the same hereby is denied.

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX G.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifth day of January A. D. 1972.

Present:

Hon. Stanley H. Fuld,
Chief Judge, presiding.

Mo. No. 975

IN THE MATTER

of

BENJAMIN A. JAVITS,

An Attorney.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

BENJAMIN A. JAVITS,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEASON KIMBALL
Deputy Clerk

(Seal.)

APPENDIX H.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of May A. D. 1972.

Present:

Hon. Stanley H. Fuld,
Chief Judge, presiding.

1 Mo. No. 331

IN THE MATTER
of
BENJAMIN A. JAVITS,
An Attorney.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.

BENJAMIN A. JAVITS,
Appellant.

A motion for reargument of a motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEASON KIMBALL
Deputy Clerk

(Seal.)

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OCT 10 1972
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-196

BENJAMIN A. JAVITS,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-196

BENJAMIN A. JAVITS,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on January 5, 1971, suspending petitioner from the practice of law in the State of New York for a period of three years. A history of the proceedings subsequent to the order of suspension is recited in the petition.

Statement of the Facts

Although a statement of the facts is contained in the petition, respondent finds it necessary, in accordance with Rule 40 (3) of the Revised Rules of this Court, to submit a supplemental statement setting forth additional facts which, in respondent's view, are essential to a determination of the petition.

The petition seeks to leave the impression that petitioner was disbarred on the basis of a record devoid of any affirmative evidence of the misconduct charged. This claim can only be described as a gross misrepresentation of the proceeding and requires respondent to demonstrate the overwhelming evidence adduced.

Petitioner, in substance, admitted in his answer to respondent's charge letter (Pet. Ex. 2)* the payments to Mexican public officials and a Mexican national upon which the charge was predicated but denied any impropriety, contending that he had relied upon an associate familiar with procedures in Mexico who had approved all aspects of the Mexican litigation.

The evidence submitted to the Referee consisted of the testimony of Mrs. Mae Korn, an attorney retained of counsel by petitioner, the testimony of petitioner taken before respondent's Committee on Grievances, the admissions contained in petitioner's answer to the charge letter served by respondent's Committee on Grievances, and a number of lengthy and complicated documents. The Mexican public officials and the Mexican national who received the payments from petitioner which are the subject of the

* Respondent here was petitioner below and vice versa.

charge were outside the Court's subpoena jurisdiction and were unavailable to both petitioner and respondent. The foregoing evidence establishes the following:

In the fall of 1961, petitioner was retained by Lewis S. Rosenstiel to represent him with respect to his marital difficulties with his wife, Susan Liss Rosenstiel, and, specifically, to obtain a divorce or annulment of the marriage, if possible. Subsequent to that retainer, petitioner employed other attorneys, including Mrs. Mae Korn, to assist him of counsel (Pet. Ex. 2).

In or about November 1961, petitioner sent Mrs. Korn to Mexico to investigate the validity of Mrs. Rosenstiel's divorce from her former husband, Felix Kaufmann, which had been obtained on or about October 2, 1954, in the First Civil Court of the District of Bravos, State of Chihuahua (hereinafter referred to as the "Kaufmann decree") (Min. p. 34). Mrs. Korn thereafter advised petitioner that her investigation disclosed facts concerning the circumstances surrounding the Kaufmann decree which indicated that it had been improperly obtained; that grounds existed to institute an action to have it declared invalid; and that if the Kaufmann decree were nullified, Mr. Rosenstiel, respondent's client, could obtain an annulment of his marriage upon the ground that he and Mrs. Rosenstiel were never legally married since she was still the wife of Felix Kaufmann (Pet. Exs. 4, 5 & 6).

Mrs. Korn consulted a prominent Mexican law firm, Basham, Ringe & Correa, Esqs., in connection with her investigation of the validity of the Kaufmann decree (Pet. Exs. 5 & 6). In late January and early February, 1962, Mrs. Korn inquired of the Correa firm concerning the possibility of bringing an action to vacate the Kaufmann de-

cree ex parte and/or calling the alleged irregularities in the obtaining of the Kaufmann decree to the attention of a Mexican public official in order to have him institute nullification proceedings on his own motion upon the ground that it had been obtained by fraud perpetrated against the Mexican Courts. In response to these inquiries, Mrs. Korn was advised that no government official would institute such an action and that an action to nullify the Kaufmann decree should properly be brought by Mr. Rosenstiel upon actual notice to all parties, including Mrs. Rosenstiel, and that such an action, if contested, might take two or more years (Pet. Ex. 5; Min. p. 52). Mrs. Korn subsequently conveyed this advice to petitioner who, in turn, informed his client, Lewis S. Rosenstiel (Min. p. 52; Pet. Ex. 12, p. 420).

When Mr. Rosenstiel expressed strong dissatisfaction with the estimated length of time necessary to obtain nullification of the Kaufmann decree (Pet. Ex. 12, p. 420), one Carmen Lopez Figueroa, a Mexican laywoman associated with Amalia Castillo Ledon, a member of the Mexican Cabinet, was hired to assist in the efforts to nullify the Kaufmann decree. Petitioner described her services as "public relations" but was unable to furnish any meaningful explanation for that term (Pet. Ex. 12, pp. 330-1). It was apparent from the services actually rendered by Miss Figueroa that she was hired to use her social and political connections in Mexico to expedite the obtaining of a nullification of the Kaufmann decree.

Miss Figueroa communicated with Jose Luis Sequerios, Esq., then Lieutenant Governor and Attorney General of the State of Chihuahua where the Kaufmann decree had been obtained. On February 26, 1962, a check in the

amount of $10,000 was drawn on petitioner's firm account at the Chemical Bank New York Trust Company in payment of a bank draft in that amount payable to Sequerios (Pet. Ex. 2). Thus, no cancelled check disclosing this payment appeared in petitioner's file.

On February 28, 1962, Mrs. Korn and Miss Figueroa traveled to Mexico to meet Sequerios. Mrs. Korn was under the impression that she was to see Sequerios in his dual capacity as Attorney General of the State of Chihuahua and a Mexican attorney, to take steps to nullify the Kaufmann decree. She had not been informed of any arrangement between the petitioner and Sequerios even though she had spoken to the petitioner about her contemplated trip to Mexico on February 27, 1962. Furthermore, she was not informed of the existence of the $10,000 bank draft payable to Sequerios which was delivered to Sequerios by Miss Figueroa on March 1, 1962.

Several days after the payment of the $10,000 to him, Sequerios turned over to Mrs. Korn and Miss Figueroa a decree (hereinafter referred to as the "Goldsmith decree"), dated February 6, 1962 (one month earlier), purporting to nullify the Kaufmann decree upon the petition, dated January 31, 1962, of one "Samuel Goldsmith", a third party who contended that he had been a creditor of the Kaufmanns and had been defrauded by their divorce in 1954 (Min. pp. 89-90; Pet. Ex. 8). The Goldsmith decree had been obtained without notice to Mrs. Rosenstiel other than the alleged posting of the petition on the courthouse bulletin board in Juarez, Mexico, for a period of three days.

The appearance of the Goldsmith decree some eight years after the Kaufmann divorce was granted, at pre-

cisely the time that petitioner was seeking to vacate the Kaufmann divorce and immediately after the hiring of Miss Figueroa and the payment of $10,000 to Sequerios, strongly suggested that these events were related. Further proof that the Goldsmith decree was manufactured by Sequerios in return for the $10,000 payment was provided by Mrs. Korn's testimony that when she inspected the Kaufmann divorce file on January 31, 1962, in Juarez, she found no evidence of the Goldsmith petition or that the Kaufmann decree was then under attack from any source.

Petitioner contended before respondent's Committee on Grievances that the $10,000 had been paid to Sequerios in February 1962, to retain him to obtain a nullification of the Kaufmann decree (Pet. Ex. 12, p. 334). Although petitioner did not categorically concede that the Goldsmith decree was produced by Sequerios in return for that $10,000 payment (a concession which would have constituted a virtual admission of the charge), it is clear that petitioner accepted the Goldsmith decree as value received for that payment. Thus, in April 1962, only two months later, he paid Sequerios an additional $500 merely to keep him informed of any development in Mexico concerning the Goldsmith decree, a service for which no payment would have been made if petitioner did not consider the previously paid $10,000 to have already been earned (Pet. Ex. 12, p. 391).

Petitioner had on an earlier occasion sought to avoid the damaging implication of any admission linking the monies paid to Sequerios and the Goldsmith decree. Thus, in 1965, in the course of an examination before trial in an action brought against him by his client, Rosenstiel, for an accounting, in which the client contended that petitioner had used monies made available to him to improperly

obtain the Goldsmith decree, petitioner testified under oath that Sequerios had not been retained until after the Goldsmith decree had been issued and that the purpose of the retainer was merely to sustain that decree against attack by Mrs. Rosenstiel (Pet. Ex. 12, pp. 388-90). That testimony not only contradicts petitioner's testimony before the referee but is inconsistent with known facts. Thus, it is conceded that on February 26, 1962, the date the bank draft for Sequerios was purchased, neither petitioner nor anyone associated with him was aware of the Goldsmith decree and that Mr. Rosenstiel's attack upon that decree was not initiated until early June 1962.

On March 8, 1962, Mrs. Korn and Miss Figueroa returned to New York and delivered the Goldsmith decree to petitioner. On that same day, Miss Figueroa was paid $10,000, some $6,000 of which was paid by check issued by petitioner payable to Mrs. Korn for "disbursements" (Pet. Ex. 12, pp. 370-72). The ultimate recipient of the payment was thereby concealed. This sizable payment itself indicates that petitioner accepted the Goldsmith decree as the product of Miss Figueroa's efforts. Petitioner denied this, contending that Miss Figueroa was to be paid only $100 to $200 per week and that the payment in question was to reimburse her for expenses incurred in traveling to Mexico. He conceded on cross-examination, however, that he had repeatedly described the payment to Miss Figueroa as a fee in the subsequent action for an accounting instituted by Rosenstiel (Pet. Ex. 12, p. 372).

Petitioner, aware that Mrs. Rosenstiel had no actual notice of the Goldsmith decree, amended the complaint in a pending separation action instituted by him in New York on behalf of Mr. Rosenstiel to state a cause of action for

annulment upon the ground that Mrs. Rosenstiel's Mexican divorce from her prior husband was invalid. He testified that he had hoped to use the Goldsmith decree to substantiate that claim before Mrs. Rosenstiel's attorneys learned of its existence and instituted proceedings to vacate it. Petitioner thereby implied his awareness that the Goldsmith decree was vulnerable to attack (Pet. Ex. 12, pp. 358-59).

In the meantime, Sequerios continued to receive payments from petitioner. In addition to the previously mentioned $500 paid in April of 1962, Sequerios was paid an additional $5,000 in May 1962, to obtain affidavits from the attorneys who had represented the Kaufmanns in procuring their divorce in 1954 (Pet. Ex. 12, pp. 391-2). These affidavits were intended to substantiate grounds for attacking the Kaufmann decree advocated by Mrs. Korn but not included in the Goldsmith decree which might be useful in the event the Goldsmith decree were successfully attacked and, it, therefore, became necessary to initiate the orthodox proceeding to vacate the Kaufmann divorce originally advocated by Basham, Ringe & Correa, Esqs. These continued efforts to obtain additional evidence warranting the nullification of the Kaufmann decree even before the Goldsmith decree was challenged, further evidence petitioner's awareness that the Goldsmith decree would not withstand scrutiny.

In June 1962, Mrs. Rosenstiel's New York attorneys learned of the existence of the Goldsmith decree and, through Mexican counsel retained by them, instituted what is known as an amparo proceeding to vacate that decree (Pet. Ex. 12, p. 342). Petitioner retained the firm of Lopez, Figueroa & Valenzuela, Esqs., to defend the amparo action brought by Mrs. Rosenstiel (Pet. Ex. 12, pp. 342-3).

Inasmuch as Mr. Rosenstiel had not been a party to the Goldsmith proceeding, he apparently had no standing to appear in the amparo action. Valenzuela, the attorney retained by petitioner, filed a notice of appearance on behalf of Goldsmith although petitioner admitted that Valenzuela had no authority to do so and the Samuel Goldsmith who allegedly procured the Goldsmith decree never appeared (Pet. Ex. 12, pp. 345-7).

Petitioner contended that he had not known at the time that Valenzuela was filing an appearance on behalf of Goldsmith without authority and did not become aware thereof until January 1963 (Pet. Ex. 11, p. 273). He conceded, however, that even after he became aware of it, he acquiesced in Valenzuela's continued participation in the amparo action in Goldsmith's name, claiming that this was a "convenience" and not a fraud upon the court affecting the validity of the proceeding (Pet. Ex. 11, p. 276). Respondent was, however, unable to reconcile this attitude towards Valenzuela's completely unauthorized appearance with the advice he had received from Mrs. Korn in the fall of 1961, that one of the principal infirmities in the Kaufmann decree demonstrating its nullity was the fact that Mrs. Kaufmann had allegedly signed the power of attorney authorizing a Mexican attorney to appear for her in the divorce action in blank without designating the specific attorney who was to represent her. If petitioner, therefore, was aware that under Mexican law an authorization to an attorney to appear admittedly signed by the client but not specifying the attorney invalidated the proceeding, he could hardly have believed that an authorization of which the client had no knowledge could have any greater validity.

While the amparo action was pending in the Mexican courts, petitioner paid Miss Figueroa the sum of $3,000 to be used as a contribution to a charity in which Miss Ledon, the member of the Mexican Cabinet, was interested in order to obtain "a favorable public relations climate" on behalf of his client. This sum was ultimately charged to the client as a disbursement in the Mexican action (Pet. Exs. 18, 12, pp. 382-3). Thereafter, petitioner paid Miss Ledon's hotel bill at the Hotel St. Regis in New York in the amount of $1,482.11, which he charged to his client for "public relations" related to the Mexican litigation (Pet. Ex. 11, p. 256). Petitioner could give no explanation for these payments and their relation to the Mexican action other than to state that at one time Miss Ledon had given a party at which he had the occasion to meet important Mexican officials including many of the judges in the federal court in which the amparo action was pending (Pet. Ex. 12, 379-81).

In March 1963, while a determination of the amparo was pending, petitioner was discharged by his client (Pet. Ex. 12, p. 348). On May 10, 1963, the Mexican Court set aside the Goldsmith decree upon the ground that it had been obtained in violation of Mrs. Rosenstiel's constitutional rights (Pet. Ex. 16).

Prior to the determination of the amparo proceeding, Mrs. Rosenstiel's New York attorneys filed affidavits in the separation action pending in New York alleging that petitioner had fraudulently procured the Goldsmith decree by paying bribes to Mexican officials (Pet. Ex. 12, p. 399). Similar allegations were subsequently made by Rosenstiel in an action instituted against petitioner for an accounting of all funds paid to him. Petitioner conceded that

despite these accusations, and the charge instituted against him by the Committee on Grievances, he never attempted to locate the Samuel Goldsmith in whose name the Goldsmith decree had allegedly been obtained to demonstrate that such a person truly existed and had never caused any independent investigation to be made of the circumstances surrounding the issuance of the Goldsmith decree (Pet. Ex. 12, pp. 399-401). Furthermore, even though petitioner testified that the Rosenstiel matter was the principal case in his office he testified that he never even read the Goldsmith decree (Pet. Ex. 12, pp. 352, 404).

Petitioner contended that he had relied upon Sol A. Rosenblatt, Esq., an attorney from whom he rented offices and who had been retained to assist in representing Mr. Rosenstiel, for advice concerning the proper steps to take with respect to the Mexican aspects of the matter (Pet. Ex. 2). Petitioner conceded, however, that in the later action for an accounting brought by Mr. Rosenstiel, petitioner submitted a sworn bill of particulars in which fees paid to Rosenblatt were described as payment for services unrelated to the Mexican litigation (Pet. Ex. 12, pp. 353-7; Pet. Ex. 18). Mr. Rosenblatt died in May 1968, shortly before the hearings before the Committee on Grievances commenced and was not available to testify.

The evidence demonstrates that the Mexican litigation was characterized by efforts to obtain results sought by petitioner through the use of a fictitious individual, Samuel Goldsmith. Thus, immediately upon learning that an orthodox attack upon the Kaufmann decree would take some years, petitioner began making payments to Mexican nationals, including public officials, who promptly produced the fraudulent Goldsmith decree vacating the Kaufmann

divorce. Thereafter, when the validity of the Goldsmith decree was attacked, attorneys employed by petitioner filed an appearance on behalf of Goldsmith although unauthorized to do so and proceeded to defend the decree in his name.

Petitioner not only acquiesced in these improper activities but personally participated in many aspects. His failure to conduct any investigation into these events, even when faced with charges that he personally engineered the fraud, further demonstrates that he was fully aware of the improprieties and sanctioned them. This is still further demonstrated by the lack of candor which characterized his testimony before the Committee on Grievances, the inconsistent answers which he gave when questioned about the underlying events in this and other proceedings and his inability to furnish any legitimate explanation for the role played by the various Mexican nationals to whom he made payments on behalf of his client.

In these circumstances, petitioner's claim that he relied upon Rosenblatt is really immaterial, for his acquiescence and participation in the procuring of a fraudulent decree nullifying the Kaufmann divorce was improper, whether done in concert with Rosenblatt or by petitioner alone.

ARGUMENT

I.

A disciplinary proceeding is not a criminal case within the meaning of the constitution.

The essentially civil nature of this licensing procedure has long been established, *Ex Parte Wall,* 107 U.S. 265, 288 (1882). To hold, as petitioner contends, that a disciplinary proceeding is in essence a criminal case, would require the courts to continue to certify to the public, and to require the public as a practical matter to continue to rely upon, attorneys whose conduct has been called into question and against whom the weight of the evidence demonstrates that there is no justification for such continued certification or reliance. In an era when confidence in the instrumentalities of the administration of justice in general and the integrity of the Bar in particular are more and more called into question such a radical lowering of standards would be intolerable. Moreover, such a holding would inevitably similarly affect any license revocation proceeding, whether it involved an attorney, a barber or a licensed retailer.

To hold that a disciplinary proceeding is a criminal case would lead to further undesirable ramifications. Attorneys who are the subject of complaints could refuse to respond to questions the answers to which might simply subject them to discipline and did not involve criminal conduct in the usual sense. The right of the courts to police their own officers might be totally undermined, because of the requirement of trial by jury in criminal cases.

The Rules of this Court concerning the discipline of its own Bar graphically demonstrates that such result was

never contemplated. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable in criminal cases, the "accused" is thereby required to come forward to explain his conduct.

A disciplinary proceeding is, in essence, nothing more than a licensing hearing in which facts surrounding the conduct of the person accused are examined to determine whether he is entitled to a continuation of the license which, in the case of an attorney, grants him an absolute monopoly to provide access to the lay public to the administration of justice and to exercise the awesome powers attendant thereto.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. Clients must rely upon this certification, for they have no means whereby they can make this determination by themselves. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined. Such proceeding does not seek to deprive the attorney of his liberty.

II.

Petitioner was not denied procedural due process.

Petitioner relies upon *In Re Ruffalo,* 390 U.S. 544 (1968). There an attorney was charged with twelve separate counts of misconduct. In the course of the subsequent hearing, the attorney testified in his own defense and, thereafter, solely on the basis of that testimony and the testimony of another witness, an additional charge of misconduct was added over the objection of the attorney's counsel. Thereafter, the Supreme Court of Ohio sustained only two of the thirteen charges, one of these being the charge added after the attorney's testimony, and suspended the attorney indefinitely.

In a subsequent disciplinary proceeding in the United States Court of Appeals for the Sixth Circuit predicated upon the state disciplinary action, the only charge considered was the one added following the attorney's testimony. This Court held that the discipline of the attorney predicated upon testimony which he had given in defense of the original charges violated procedural due process in that the attorney "had no notice that [the conduct admitted in his testimony] would be considered a disbarment offense until *after* both he and [a witness] had testified at length on all the material facts pertaining to this phase of the case", 390 U.S. 544, 550-1.

No charges were added in this proceeding predicated upon petitioner's testimony.

Petitioner contends that in his opinion, the Appellate Division found him guilty of a charge not made against him.

The petition which instituted the disciplinary proceeding in the Appellate Division contained a preamble together with twenty specifications of acts which constituted the professional misconduct charges preferred against petitioner. Evidence was introduced during the course of the hearing in support of the specifications alleged in the petition. The Appellate Division, in rendering its decision, reviewed the evidence which had been introduced during the course of the proceeding both by petitioner and respondent. Petitioner had been served with a copy of the petition and he knew exactly what the acts were that he was alleged to have committed which constituted the professional misconduct alleged in the petition. Petitioner had every opportunity to defend against said alleged acts and, in fact, did offer a defense to the allegations contained in the petition. The basic question to be determined by both the Referee appointed by the Appellate Division and the Appellate Division itself was whether petitioner had committed the alleged acts of professional misconduct. A reading of the Referee's Report, together with the Appellate Division's opinion, clearly reveals that petitioner was found to have committed the alleged acts of professional misconduct. There is nothing in the opinion of the Appellate Division which tends to find that petitioner was also found guilty of other charges not presented to the Court below.

There is no basis whatever for stating that the Appellate Division did not sustain the charges in the petition but found petitioner guilty of charges not contained in the petition. The Court, in its opinion, stated, and correctly so, that the charges against petitioner were "that the respondent 'has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying

monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree' ". Later on in its opinion the Court stated that "the referee has rendered a report sustaining the charges and his report has been filed with this Court". The Court then stated that "the findings of fact and the report of the referee are confirmed". Judge McNally stated in his opinion that "the record amply supports the report of the learned referee, the Hon. George Trosk, in his conclusion that respondent attempted to perpetrate a fraud upon the Governments of Mexico and the United States by paying monies to Mexican public officials and a Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree". It is axiomatic that since Judge McNally's dissent concerned the question of discipline imposed by the majority rather than his sustaining of the charges that he was of the opinion that the majority had sustained the charges contained in the petition. In addition, the misconduct of which the Court found the petitioner guilty was all contained in the petition which detailed what transpired in the perpetration of the attempted fraud.

Petitioner's counsel relies upon the following language from the Court's opinion:

> "The evidence, within the framework of the charges, does establish serious professional misconduct and a course of conduct intending to exert improper personal influence upon the courts, and a lack of candor and fairness with the courts, in fostering unjustified and questionable litigation and defenses, in the improper solicitation of employment and, in general, in conduct de-

signed to bring dishonor upon the courts and on the administration of justice (see Canons 3, 15, 22, 27, 29, 30, 31 and 32 of the Canons of Professional Ethics)."

The argument has been made by petitioner's counsel that the Court, in the above-quoted language, found the petitioner guilty of misconduct not charged in the petition. The fact that the Court cited four Canons which were not contained in the charge letter is of no consequence since the Court sustained the charges of professional misconduct recited in both the charge letter and the petition.

The conclusions the Court referred to in the language quoted, *supra,* are neither inconsistent with nor in addition to the charges contained in the petition. The charges of misconduct are detailed in paragraph IV of the petition and contain 20 sub-paragraphs which allege what transpired in the perpetration of the attempted fraud. These sub-paragraphs contain allegations of fact which when proved by the evidence to the satisfaction of the Court justify the Court in arriving at the conclusions set forth in the quoted language.

III.

Appellate review of the order imposing discipline was available to petitioner.

Petitioner contends that New York law does not have a procedure whereby he would be entitled to obtain appellate review of the order imposing discipline. This proposition is not correct. As petitioner himself has indicated in his Brief, he has on several occasions sought to have the highest Court of the State of New York, the Court of Appeals, review the issues which he is now presenting to this Court. The procedural due process point which petitioner raises in his Brief, namely the applicability of this Court's holding in *Matter of Ruffalo, supra,* was raised by petitioner each time he applied to the Court of Appeals for permission to appeal to that Court on the ground that his constitutional rights were violated by the Appellate Division. The argument that petitioner now makes to this Court concerning the alleged violation of his constitutional rights was made to the Court of Appeals on each occasion he applied to that Court. In denying each of petitioner's applications, it is obvious that the Court of Appeals concluded that petitioner's constitutional rights were not violated by the Appellate Division and that no substantial constitutional question had been presented to the Court of Appeals for review. Petitioner's contention that the Court of Appeals either ignored or rejected this Court's holding in *Matter of Ruffalo, supra,* is competely erroneous. Petitioner fully developed his argument in making application to the Court of Appeals and, in fact, submitted the same argument to that Court as he is now submitting to this Court.

The very statutes which petitioner cites in his Brief, permits him to have the Appellate Review of the order imposing discipline. Petitioner availed himself of the procedures under New York law and inasmuch as there was no substantial constitutional question involved with respect to the grounds for his appeal, the Court of Appeals refused to grant him permission to appeal. Petitioner's appeal as of right was dismissed by the Court of Appeals since no substantial constitutional questions were involved.

The appellate procedures of the State of New York were available to petitioner but it is apparent that the legal arguments he propounded and submitted to the Court of Appeals did not sufficiently impress that Court as requiring the appellate review petitioner sought.

IV.

Petitioner raises the equal protection argument for the first time in this Court.

At no time in any of the proceedings in the Courts of the State of New York has petitioner contended that he has been denied the equal protection of the laws of the State of New York and that his constitutional rights under Amendment XIV of the United States Constitution were violated.

In these circumstances, it is respectfully submitted that the jurisdiction of this Court has not been preserved since it does not affirmably appear from the record that the federal question here urged for the first time was presented to the State Courts, *Lynch et al.* v. *N. Y. ex rel. Pierson*, 293 U.S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers*, 349 U.S. 458.

In any event, as was shown above, petitioner did have appellate review of the order imposing discipline available to him and he attempted to obtain such review from the highest Court of the State of New York and that on each occasion, that Court determined that there were no grounds for such appellate review of the order imposing discipline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-196

BENJAMIN A. JAVITS,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In its brief in opposition to the Petition for Certiorari, Respondent displays a lack of sensitivity to the rights of procedural due process which Petitioner, as well as all other attorneys similarly situated, are entitled. Respondent, in so doing, overlooks controlling decisions of this Court, and for this reason alone certiorari should be granted. Thus, in Point I, Respondent argues that: "A disciplinary proceeding is not a criminal case within the meaning of the Constitution." In so arguing, Respondent cites an 1882 case not in point (*Ex Parte Wall*, 107 U. S.

265 [1882]) and overlooks all of the cases cited by Petitioner (*Matter of Ruffalo,* 390 U. S. 544 [1968]; *Spevack* v. *Klein,* 385 U. S. 511 [1967]; *Law Students Research Council, Inc.* v. *Wadmond,* 401 U. S. 154 [1971]; *Erdmann* v. *Stevens,* 458 F. 2d 1205, 1209 2d Cir. [1972]), which hold that the constitutional safeguards to which attorneys are entitled in disciplinary proceedings, are analogous to the protections afforded defendants in a criminal case.

In Point II of its brief, Respondent's effort to distinguish *Matter of Ruffalo, supra,* is so frivolous that it amounts to an admission that the state Courts simply ignored the holding of this Court in *Ruffalo.* Thus, Respondent attempts to distinguish *Ruffalo* (page 15) on the basis that "no charges were added in this proceeding predicated upon Petitioner's testimony." In other words, the Bar Association apparently contends that *Ruffalo* permits State Courts to convict an attorney based upon charges to which he was given no notice and opportunity to be heard so long as the new charges were not based upon the testimony of the accused.

The holding of *Ruffalo* is that attorneys in disciplinary proceedings are entitled to notice and an opportunity to be heard in accordance with basic principles of due process. The fact that the Bar Association is not willing to concede this elementary principle and displays such a lack of understanding of the protection it is designed to afford is alone reason for granting certiorari. The Bar Association is apparently not willing to concede that the potential destruction of a man's livelihood and reputation are serious enough to warrant constitutional protection for the accused. It is submitted that this Court should grant certiorari and make it clear that its decision in *Matter of Ruffalo* cannot be ignored by the State

Courts, and that the lives and reputations of attorneys cannot be destroyed without adhering to the principles of procedural due process.

The position of the Bar Association is amply illustrated by the following statement on page 18 of its brief:

> "The argument has been made by petitioner's counsel that the Court, in the above-quoted language, found the petitioner guilty of misconduct not charged in the petition. The fact that the Court cited four Canons which were not contained in the charge letter is of no consequence since the Court sustained the charges of professional misconduct recited in both the charge letter and the petition."

Respondent's lack of awareness of Petitioner's constitutional rights is manifested by the fact that it is willing to treat the above "four Canons" as simply excess charges added by the Court. Respondent, while admitting that no notice was given to Petitioner, fails to consider that Petitioner had no opportunity to prepare a defense to charges that he had violated the above Canons and that the Appellate Division obviously considered the violation of these Canons in imposing punishment. Moreover, no Appellate Court ever reviewed Petitioner's claim that he was found guilty of charges of which he had no notice.

In Point II of the Petition for Certiorari, Petitioner argues that he was not given an independent judicial forum to consider his argument that the Appellate Division violated his constitutional rights. In disputing this point, Respondent overlooks all of the cases and statutes cited by Petitioner and argues that all prior orders of the New York Courts constituted decisions on the merits, rejecting Petitioner's constitutional claims. Suffice it to point out that all prior orders of the New York Courts did not

reach the merits but instead held that Petitioner was not entitled to a hearing on his constitutional claims. The effect of these orders is, of course, that Petitioner has never had independent judicial consideration of his constitutional arguments.

The prior orders of the New York Courts are analogous to this Court's denial of a petition for certiorari. For example, if the Federal Appeals Court, acting as the Court of first instance, convicted a person on the basis of new charges, this Court would certainly not consider its discretionary certiorari jurisdiction as a complete, independent review of the alleged constitutional violations.

Respondent's argument in Point IV of its brief, that Petitioner's equal protection argument was not raised below, is not true and is contradicted by the record. The argument was raised on pages 13 and 14 of Petitioner's brief before the New York Court of Appeals on his motion for reargument of the denial by the Court of Appeals of his motion for leave to appeal. For the convenience of the Court, the argument as raised below is annexed hereto as Exhibit 1.

Finally, Respondent's selective statement of facts is obviously designed to camouflage the issues and to attempt to influence this Court into denying certiorari on the basis that even if constitutional rights were violated, Petitioner was guilty in any event.

Petitioner emphatically denies that he had any knowledge of any improprieties; if they, in fact, occurred. It should be noted that in the entire self-serving recitation of facts, the Bar Association can demonstrate nothing in the record to show that it proved the element of scienter. On page 5 of its brief, Respondent draws an inference that knowledge existed by suggesting that the $10,000 payment was made by bank check instead of regular check

so that no cancelled check would be available as a means of tracing. However, Respondent neglects to state that the record of the payment was readily available in Petitioner's books and records and denominated as payment to Mexican counsel. Clearly, if there was any effort made to conceal this payment, a record would not have been so readily available in Petitioner's books and records. The fact is that there is simply no evidence that Petitioner had knowledge of any wrongdoing.

Finally, it must be reiterated that Petitioner was given no independent forum to review his above argument that no scienter existed for the conviction of the above charge. As stated in Point III of the Petition for Certiorari, any other member of Petitioner's class in New York State would have been entitled to independent consideration of this issue. It is respectfully submitted that this, in and of itself, amounts to a denial to Petitioner of equal protection of the laws and, in any event, presents a novel and important issue which this Court should review by granting the writ.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Writ of Certiorari be granted.

Respectfully submitted,

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EXHIBIT I

Petitioner's Equal Protection Argument as Raised Below

By way of illustration, in civil service proceedings involving *police, teachers,* etc., the employee being charged has an appeal as of right for enforcement of Constitutional guarantees. See *Murray* v. *Murphy, supra; Shapiro* v. *Board of Regents,* 16 N. Y. 2d 783 (1965). His procedure is to institute an Article 78 proceeding in the Appellate Division, which court reviews the procedure and findings of the departmental hearing and reviews the Constitutional issue of whether the departmental body found the employee guilty of charges without notice.

It is respectfully submitted that an attorney who is suspended from practicing law in the State by the Appellate Division stands in the same position as a public employee who is being suspended by his governmental employer. Both are being deprived of their livelihood and reputation and are thereby suffering the same punishment at the hands of the State. Governmental employees are provided with a procedure to assure protection of Constitutional safeguards; failure to provide attorneys with a similar procedure constitutes a flagrant violation of equal protection of the laws.